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November 1990

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Recommended Citation
George D. Brown. "When Federalism and Separation of Powers Collide - Rethinking *Younger* Abstention." *George Washington Law Review* 59, (1990): 114-156.

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When Federalism and Separation of Powers Collide—Rethinking *Younger* Abstention

George D. Brown*

Introduction

What would the Rehnquist Court do if faced with a conflict between its vision of federalism and its commitment to the separation of powers? A case can be made that the abstention doctrines present such a conflict and that the Court is aware of it. This Article focuses on *Younger* abstention[1] because *Younger* is the paradigm of a federalism-based restrictive jurisdictional doctrine. It is triggered when the federal plaintiff is already a party in a pending state proceeding, if that proceeding involves essentially the same issues, important state interests are present, and the plaintiff will have a full and fair opportunity to raise any federal issues in the state forum.[2] *Younger* is abstention in name only. The plaintiff must remain in the state system throughout the adjudication until United States Supreme Court review is available. Chances of this review may be slight, but the High Court is the only federal court the plaintiff will ever see.[3]

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1. The doctrine derives its name from Younger v. Harris, 401 U.S. 37 (1971). For a discussion of *Younger*, see *infra* notes 39-44 and accompanying text.

2. *See generally* C. WRIGHT, THE LAW OF FEDERAL COURTS 322-30 (4th ed. 1983) (discussing the *Younger* doctrine and related case law).

3. A possible exception is where a state criminal defendant is granted federal habeus corpus review in a federal district court. *See* 28 U.S.C. § 2254 (1988). The availability of federal habeus corpus for convicted state defendants is, however, increasingly problematic.

Younger thus cuts a large swath in federal trial court jurisdiction. In terms of cases affected, it is probably the most significant of the abstention doctrines.[4] The effect on civil rights plaintiffs suing under section 1983 is particularly telling.[5] It is in such cases—based on the defendant's acting under color of state law—that important state interests are likely to be found.

The Court finds the basis for *Younger* in "principles of comity and federalism."[6] Critics have insisted that the Court's attachment to these principles has led it to fashion bad jurisdictional law, thereby "eviscerating [section] 1983"[7] and downgrading the role of federal courts in vindicating federal rights.[8] As an object of liberal criticism, *Younger* is hardly unique. The entire range of Burger-Rehnquist Court jurisdictional doctrines are attacked from within and without the Court, often on similar grounds.[9] The problem for the critics is that the arguments are mainly that—arguments. Take standing, for example. The Court may seem incorrect, even woefully so, in applying the harm-causation-redressability standard to a given set of facts.[10] There is still usually room for some disagreement, and that room increases as the issues are more broadly framed. When the Court declines to imply a right of action from a statute not expressly providing for one[11] it can be argued that this is an improper approach to the role of courts in furthering statutory objectives.[12] It is surely defensible, however, to require Congress to be somewhat specific about matters of remedy.[13] Reasonable minds may also differ with respect to the Court's elaborate edifice of Eleventh Amendment doctrine.[14] The cases barring suits against states

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4. *See* Levit, *The Caseload Conundrum, Constitutional Restraint and the Manipulation of Jurisdiction*, 64 NOTRE DAME L. REV. 321, 336 (1989) (stating that *Younger* is the broadest of the abstention theories).

5. 42 U.S.C. § 1983 (1988) provides as follows:
> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

6. Huffman v. Pursue, Ltd., 420 U.S. 592, 602 (1975).

7. Juidice v. Vail, 430 U.S. 327, 346 (1977) (Brennan, J., dissenting).

8. *E.g., id.* at 341-47; *see* Lee & Wilkins, *An Analysis of Supplemental Jurisdiction and Abstention with Recommendations for Legislative Action*, 1990 B.Y.U. L. REV. 321, 354-55 (stating that a broad application of *Younger* would curtail federal jurisdiction greatly).

9. *See, e.g.*, Amar, *Of Sovereignty and Federalism*, 96 YALE L.J. 1425, 1425-26 (1987).

10. *See, e.g.*, Nichol, *Abusing Standing: A Comment on* Allen v. Wright, 133 U. PA. L. REV. 635, 635-42 (1985).

11. *See, e.g.*, Transamerica Mortgage Advisors v. Lewis, 444 U.S. 11 (1979).

12. *See, e.g.*, Frankel, *Implied Rights of Action*, 67 VA. L. REV. 553, 567 (1981).

13. *See* Thompson v. Thompson, 484 U.S. 174, 188-89 (1988) (Scalia, J., concurring).

14. On its face the Eleventh Amendment forbids suits against states in federal courts

in federal courts are based largely on a reading of history that many have questioned.[15] Perhaps the Court is wrong here too. That is not to say that it has no authority to fashion this body of doctrine.

This can be said of *Younger,* however.[16] The debate over *Younger* is different because serious questions of authority and legitimacy are present. The federal plaintiff comes to the district court armed with a federal cause of action—section 1983 plus an underlying provision of federal law, usually the Constitution—and a valid grant of jurisdiction authorizing the tribunal to hear the case.[17] To send her packing, the Court interposes neither the Constitution nor statutory interpretation, but *its own* notions of comity and federalism. It seems to be flouting the will of Congress in an area over which Congress has clear authority: the jurisdiction of the federal courts.[18] This step is surprising for a Court that often emphasizes the authority of Congress over federal jurisdiction[19] and is generally deferential to the legislative branch.[20]

Younger abstention can thus be viewed solely as a separation of powers issue.[21] It is a separation of powers problem in the literal sense that the Court is making law regarding federal jurisdiction that seems at odds with congressional statutes on the subject. It is also a separation of powers problem in a broader, structural sense. Even if specific legislative language does not resolve all jurisdictional questions, for the Court to develop a body of jurisdictional law is to exceed the judiciary's constitutional bounds and trespass on the legislature's domain. If either of these forms of the critique is valid, the logic of the Court's general position of deference to Congress would require the federalism-based, judge-made doctrine of *Younger* to yield. The critique emerges not as another argument but as an end to an argument.

So far the Court has largely dealt with the separation of powers problem by ignoring it. The *Younger* cases say little about the source

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by noncitizens and foreigners. In Hans v. Louisiana, 134 U.S. 1 (1890), however, the Court extended the amendment to a damages action by a citizen against his own state. Post-*Hans* doctrine has grown into a complex set of rules that, for example, permit citizens to sue their own states for equitable relief (so long as they do not name the state as defendant) and permit Congress to remove the states' immunity from suit (at least if it follows special drafting rules). For a survey of these developments, see Brown, *Has the Supreme Court Confessed Error on the Eleventh Amendment? Revisionist Scholarship and State Immunity,* 68 N.C.L. REV. 867 (1990).

15. *E.g.,* Gibbons, *The Eleventh Amendment and State Sovereign Immunity: A Reinterpretation,* 83 COLUM. L. REV. 1889 (1983).

16. The principal articulation of this critique is Redish, *Abstention, Separation of Powers, and the Limits of the Judicial Function,* 94 YALE L.J. 71 (1984).

17. Jurisdiction might be based on section 1343(a)(3) of title 28, the jurisdictional counterpart of section 1983, or on section 1331 of title 28, the general federal question jurisdiction statute. The latter no longer contains a minimum jurisdictional amount. Federal Question Jurisdictional Amendments Act of 1980, Pub. L. No. 96-486, 94 Stat. 2369.

18. *See, e.g.,* Juidice v. Vail, 430 U.S. 327, 343-44 (1971) (Brennan, J., dissenting).

19. *E.g.,* Owen Equip. & Erection Co. v. Kroger, 437 U.S. 365 (1987).

20. *See infra* notes 139-44 and accompanying text.

21. Professor Redish takes this position in his article. Redish, *supra* note 16, at 74. He makes it clear, however, that he also disagrees with *Younger* as a matter of policy. *Id.* at 71-72 & n.5.

of the Court's authority to renounce jurisdiction based on notions of comity and federalism. How to reconcile this renunciation with federal statutory law is discussed even less. Recent abstention cases suggest, however, that the Court is aware of the separation of powers problem and deeply troubled by it.[22] The Court increasingly has invoked the "virtually unflagging obligation" of the federal courts to exercise the jurisdiction conferred upon them.[23] In *New Orleans Public Service Inc. (NOPSI) v. City Council,*[24] decided last year, the Court went so far as to state that "[o]ur cases have long supported the proposition that federal courts lack the authority to abstain from the exercise of the jurisdiction that has been conferred."[25] It then reversed a lower court's plausible application of *Younger* to state administrative proceedings.[26] *Younger* is anything but dead, as the 1987 decision in *Pennzoil Co. v. Texaco,*[27] shows; but the notion of a "virtually unflagging obligation" of a federal court to exercise the jurisdiction granted cuts against the doctrine.[28] The same reasoning is at work in the apparent curtailment of other abstention doctrines.[29] So-called *Colorado River* abstention[30] has been all but eliminated on precisely this ground.[31]

This Article examines the separation of powers critique of *Younger* and the Court's apparent concern with it. The critique is forceful, particularly in its text-based (as opposed to institutional) form, but is not the "irrebuttable" weapon that its major proponent has claimed.[32] The Article begins by looking for support of the critique in the Court's recent cases addressing separation of powers issues,[33] but finds that these decisions do not support the separation of powers critique. Rather, they emphasize a cooperative system of shared

22. *E.g.,* New Orleans Pub. Serv., Inc. (NOPSI) v. City Council, 109 S. Ct. 2506 (1989).

23. *Id.* at 2513 (quoting Deakins v. Monaghan, 484 U.S. 193, 203 (1988)).

24. 109 S. Ct. 2506 (1989).

25. *Id.* at 2512.

26. *Id.* at 2520.

27. 481 U.S. 1 (1987). In *Pennzoil* the Court extended *Younger* abstention to state civil proceedings between private parties in which the state had the tangential interest of protecting from attack its post-judgment procedures giving the judgment creditor rights over the defendant's property. *Id.* at 10-17.

28. Indeed, as discussed below, if one focuses on the notion of an obligation to exercise jurisdiction conferred, it is hard to see how abstention in any form is permissible. *See infra* notes 243-52 and accompanying text.

29. *E.g., NOPSI,* 109 S. Ct. at 2513-15 (declining to apply *Burford* abstention).

30. This doctrine takes its name from Colorado River Water Conservation Dist. v. United States, 424 U.S. 800 (1976).

31. Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 15 (1983).

32. Redish, *supra* note 16, at 110.

33. *E.g.,* Mistretta v. United States, 488 U.S. 361 (1989); Morrison v. Olson, 487 U.S. 654 (1988).

functions in which *Younger* abstention looks quite at home.[34] Showing concern for the nation's judicial system as a whole, and striving to maintain a federal-state balance seem appropriate for the Supreme Court.[35] Moreover, the separation of powers critique leaves no room for any exercise of abstention at all. Even Justice Brennan, the Court's strongest critic of *Younger* on separation of powers grounds, did not advocate taking the critique this far.[36] Of course if Congress has spoken, that is the end of the matter regardless of what would be sound policy. Thus, the Article examines in detail the relevant statutes and the text-based critique's application to them.[37] The ultimate question, however, is not one of language, but of how to approach the broad general allocations of authority in the jurisdictional grants and the broad remedial structure established by section 1983. Perhaps that is the main point: with *Younger* as with other jurisdictional doctrines, issues of policy will not go away even if labelled separation of powers.

Policy though it may be, however, the separation of powers critique has enough force to greatly trouble the current Court. The Article concludes with an analysis of how the Court has manifested this concern and where it might lead.[38] *Younger* is not about to vanish, but a period of reexamination and likely retrenchment has surely set in. The Court appears anxious both to legitimize the doctrine and to limit it. Perhaps these goals can be achieved through application of theories of activist statutory construction or vigorous federal common law. Neither is likely to appeal to the Rehnquist Court. Alternative justification can be found in notions of equity, or in the basic Article III concept of the "judicial power." What will drive the Court to seek and articulate a justification is that *Younger* presents a tension between respect for state processes and adherence to the role which Congress has prescribed for the judiciary. Perhaps when the Court's rethinking progresses, *Younger* will emerge as a mid-point—an attempt to harmonize the two imperatives. Having now seen the matter as a separation of powers problem, the Court will probably tilt away from federalism, so to speak, and carve out a narrower doctrine. Fears that *Younger* would emerge as "The Beast that Ate New York City" can, in any event, be put to rest.

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34. This point is developed *infra* at Part II.

35. *See* Pennzoil Co. v. Texaco, 481 U.S. 1, 11 n.9 (1987) (stating that abstention doctrines "reflect a complex of considerations designed to soften the tensions inherent in a system that contemplates parallel judicial processes").

36. Justice Brennan concurred in *Younger*, 401 U.S. at 75. He has, however, been extremely critical of the extensions of *Younger*, largely on the ground that they run counter to the intent of Congress. *See, e.g.*, Juidice v. Vail, 430 U.S. 327, 341-45 (1977) (Brennan, J., dissenting).

37. *See infra* notes 214-42 and accompanying text.

38. *See infra* notes 268-318 and accompanying text.

I. Younger *Abstention, Its Reaches and Vulnerabilities*

A. Younger, *Its Extensions and Some General Critiques*

Younger originated in the criminal context, but soon showed itself capable of extraordinary growth. The plaintiff in *Younger v. Harris*[39] brought a section 1983[40] action in federal court to enjoin a state criminal proceeding in which he was a defendant. He challenged the state statute under which he was being prosecuted as violative of the First Amendment. The Supreme Court directed dismissal of the section 1983 proceeding. Justice Black's opinion for the Court contains several different strands. One, which is largely ignored in later *Younger* cases, is the view that a pre-enforcement challenge to a state statute on its face presents serious problems of ripeness under Article III.[41] Had the decision rested on this ground, there would be no *Younger* doctrine as that term is used today.[42] The doctrine instead is based on Justice Black's analysis of the bearing on the federal case of pending state criminal proceedings. Asking the federal court to enjoin those proceedings presented a classic equity problem: the plaintiff sought equitable relief when he appeared to have an adequate remedy at law. He could challenge the state statute as a defense to the criminal proceeding. Had the decision stopped here, it would have been an important federal equity decision,[43] but there would still be no "*Younger* doctrine." What gives the decision its extraordinary force is Justice Black's election to move beyond equity and invoke principles of "comity" to elevate the pendency of state proceedings to the dispositive reason for the federal court to abstain from hearing the case. He defined comity as

> a proper respect for state functions, a recognition of the fact that the entire country is made up of a Union of separate state governments, and a continuance of the belief that the National Government will fare best if the States and their institutions are left free to perform their separate functions in their separate ways.[44]

With this broad and fundamental basis, *Younger* abstention soon emerged as a doctrine that requires the federal courts not to interfere with state proceedings in a wide range of contexts, including

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39. 401 U.S. 37 (1971).

40. 42 U.S.C. § 1983 (1988).

41. *Younger*, 401 U.S. at 52-54.

42. *Cf.* Redish, *supra* note 16, at 93-94 (discussing First Amendment analysis of *Younger*).

43. In particular, *Younger* cut back on the seemingly hospitable approach to injunctive relief for plaintiffs with First Amendment claims that the Court had shown in Dombrowski v. Pfister, 380 U.S. 479 (1965).

44. *Younger*, 401 U.S. at 44.

civil nuisance actions,[45] contempt proceedings,[46] proceedings to review parental fitness,[47] and at least some administrative actions.[48] While all of these cases involve significant participation by state government actors, the Court has extended *Younger* to private civil proceedings in which the state plays an ancillary role.[49] The doctrine may not be limited to cases seeking equitable relief. In an action for damages based on allegedly unconstitutional administration of tax laws, for example, the Court relied in part on *Younger* in directing dismissal.[50] A major theme in all these cases is respect for the state judiciary's ability to resolve federal issues, and the desire not to interfere with its performance of this function.[51]

The *Younger* doctrine, both in the original decision and its extensions, contains many uncertainties and is open to a range of criticisms.[52] The source of law itself is open to question. The various opinions suggest that *Younger* rests on a statute,[53] is not statutorily based,[54] reflects principles of equity,[55] and goes beyond equity to more fundamental principles of comity and federalism.[56] Whatever the source, the Court has not been forthright in discussing its authority to utilize that source, given the possibility that statutes address the matter directly. Another methodological weakness is that though *Younger* appears to represent a kind of balancing of federal and state interests, the nature and weight of the federal interest is not adequately discussed. As for the other side, the Court often lumps under the heading "important state interest" both the state's role as adjudicator of disputes and its concern with the underlying subject matter.[57]

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45. Huffman v. Pursue, Ltd., 420 U.S. 592 (1975).

46. Juidice v. Vail, 430 U.S. 327 (1977).

47. Moore v. Sims, 442 U.S. 415 (1979).

48. Ohio Civil Rights Comm'n v. Dayton Christian Schools, 477 U.S. 619 (1986).

49. Pennzoil Co. v. Texaco, 481 U.S. 1 (1987). For a discussion of *Pennzoil,* see Althouse, *The Misguided Search for State Interest in Abstention Cases: Observations on the Occasion of* Pennzoil v. Texaco, 63 N.Y.U. L. REV. 1051 (1988).

50. Fair Assessment in Real Estate Ass'n v. McNary, 454 U.S. 100 (1981).

51. *See, e.g.,* Trainor v. Hernandez, 431 U.S. 434, 445-46 (1977). The Court also analyzes the state's interest in the underlying subject matter of the litigation. *E.g., id.* at 444 (noting the state interest in its welfare programs).

52. *See, e.g.,* Redish, *The Doctrine of* Younger v. Harris: *Deference in Search of a Rationale,* 63 CORNELL L. REV. 463, 473-77 (1978).

53. In *Younger* itself Justice Black stated that dismissal was required because of "the national policy forbidding federal courts to stay or enjoin pending state court proceedings except under special circumstances." 401 U.S. at 41. His opinion suggests that the policy is both reflected in and derived from the Anti-Injunction Act, 28 U.S.C. § 2283 (1988), which has been on the books since 1793. *Younger,* 401 U.S. at 43.

54. In Huffman v. Pursue, Ltd., 420 U.S. 592 (1975), Justice Rehnquist made it clear that the judicial policy embodied in *Younger* is separate and distinct from any statutory source. *Id.* at 600 n.15.

55. *Younger* can be read as an equity decision, and efforts have been made to so confine it. *See, e.g.,* Juidice v. Vail, 430 U.S. 327, 339 (1977) (Stevens, J., concurring).

56. The post-*Younger* decisions have moved away from the equity rationale. In *Huffman,* for example, Justice Rehnquist referred to "the principles of comity and federalism on which *Younger* is based." 420 U.S. at 602.

57. In *Huffman* the majority stated that "interference with a state judicial proceeding prevents the state not only from effectuating its substantive policies, but also from continuing to perform the separate function of providing a forum competent to vindicate any constitutional objections interposed against those policies." *Id.* at 604. However,

A different critique of *Younger* focuses on the extension of the doctrine beyond the narrow contours of state criminal trials.[58] The rationale for abstention in the criminal context is that though federal courts having jurisdiction should act on the plaintiff's federal cause of action, interference with an ongoing criminal proceeding is indeed a drastic step. Equity's tradition of restraint calls for abstention in this context but it is equity itself rather than any broader considerations of comity and federalism that governs. Even though *Younger* may have transposed equity to the federal-state context, the decision should be limited in accord with equity's special deference to the criminal law.[59] Thus the Court was unfaithful to *Younger*'s foundations when it called for abstention in favor of a state civil nuisance proceeding, even if that case could plausibly be labelled quasi-criminal.[60]

Underlying these critiques of *Younger* abstention is a more fundamental argument: that the Court has exalted notions of judicial federalism over a proper concern for the role of national tribunals in the vindication of national rights.[61] As Justice Brennan frequently reminded his brethren, the Civil War amendments and ensuing legislation transformed the role of federal courts: "the lower federal courts 'ceased to be restricted tribunals of fair dealing between citizens of different states and became the *primary* and powerful reliances for vindicating every right given by the Constitution, the laws, and treaties of the United States.' "[62] *Younger* goes against the spirit of this development in our federal structure. Its focus on the capacity of state courts to handle federal issues is simply misplaced, even if they can do so as well as federal courts.[63]

Criticisms of *Younger* on the basis of policy and doctrine have force, but in many respects they mirror the weakness of general criticisms of Burger-Rehnquist Court federal jurisdictional doctrine alluded to above: there are arguments to be made on both sides. Take the equity-based critique of the extension cases, for example.

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the dominant thrust behind the extensions of *Younger* is respect for state courts. If this respect is key, the nature of the underlying proceeding might well make no difference given the fact that the state's role as adjudicator is constant. *See, e.g., Juidice,* 430 U.S. at 344-45 (Brennan, J., dissenting) (decrying the Court's "ultimate goal of denying § 1983 plaintiffs the federal forum in any case, civil or criminal, when a pending state proceeding may hear the federal plaintiff's federal claims").

58. *See, e.g., Huffman,* 420 U.S. at 613-16 (Brennan, J., dissenting).

59. *Id.* at 613-14 (Brennan, J., dissenting).

60. *Id.*

61. *See, e.g.,* Amar, *supra* note 9, at 1425-26.

62. Steffel v. Thompson, 415 U.S. 452, 464 (1974) (quoting F. FRANKFURTER & J. LANDIS, THE BUSINESS OF THE SUPREME COURT 65 (1928)).

63. *See, e.g.,* Trainor v. Hernandez, 431 U.S. 434, 456 (1977) (Brennan, J., dissenting).

The cases involving civil nuisance and civil contempt are not criminal cases, but they serve many of the same functions of vindicating the authority of the state.[64] If this interest triggered restraint in the criminal context, the Court has not bent the doctrine beyond recognition by applying it in the quasi-criminal context. The argument is that the Court is wrong. Similarly, calls for better balancing do not invalidate the process of balancing.

Questions of the Court's authority to look to comity and of the proper role of the federal judiciary, however, raise issues of a different order. They suggest that positive law—either the Constitution or federal statutes—speaks to the matter authoritatively and directs the federal courts to hear the cases in question. If so, *Younger* abstention is not simply a wrong policy conclusion; it is illegitimate. Thus, the most telling critique of *Younger* is not based on policy but on considerations of separation of powers. The next subsection takes a preliminary look at this critique.

B. The Separation of Powers Critique: A Preliminary Examination

Underlying the separation of powers critique are basic premises about Congress's powers under Article III and Article I.[65] Congress has plenary power over the jurisdiction of federal courts. Lower federal courts, in particular, can hear no case unless Congress has authorized it. Indeed, Congress is under no constitutional duty to create those courts at all.[66] Article III does impose some limits on the cases Congress can assign. For example, a state law action between nondiverse parties would be outside the federal judicial power. Other provisions of the Constitution may impose limits on Congress's power to deny jurisdiction in particular instances,[67] but these limits are largely theoretical and do not detract from the force of the general premise of legislative power over judicial business.

A jurisdictional statute such as section 1331 of title 28 is an exercise of that power.[68] It represents a legislative judgment that a class of cases can be brought in federal court. To paraphrase a famous passage in *Cary v. Curtis*,[69] the statute is an exercise of Congress's

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64. *See, e.g.*, Juidice v. Vail, 430 U.S. 327, 335-37 (1977); *Huffman*, 420 U.S. at 603-07.

65. U.S. CONST. art. I, § 8 provides:
> The Congress shall have Power To constitute Tribunals inferior to the Supreme Court.

66. *See* Sheldon v. Sill, 49 U.S. (8 How.) 441, 448-49 (1850); C. WRIGHT, *supra* note 2, at 36-39 (discussing the theory that Congress must vest all federal jurisdiction in some courts).

67. *See* Gunther, *Congressional Power to Curtail Federal Court Jurisdiction: An Opinionated Guide to the Ongoing Debate*, 36 STAN. L. REV. 895 (1984). In theory, a denial of jurisdiction to assert specified federal rights would act to abridge those rights, and thus would violate the constitutional provisions establishing those rights. *See generally* Tribe, *Jurisdictional Gerrymandering: Zoning Disfavored Rights out of the Federal Courts*, 16 HARV. C.R.-C.L. L. REV. 129 (1981).

68. 28 U.S.C. § 1331 (1988) reads:
> The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.

69. 44 U.S. (3 How.) 236 (1845).

choice as to "the exact degrees and character"[70] of federal jurisdiction. A federal court must honor this choice. Just as that court could not take a case beyond its jurisdiction, it follows from the congressional mandate that the Court cannot refuse to take a case within the congressional mandate. Thus presented, the separation of powers critique of *Younger* is initially based on legislative text. The point is not simply that Congress rather than the Court has the power over jurisdiction, but that it has exercised that power. The courts' general duty in a tripartite system is to apply the law.[71] This duty encompasses jurisdictional statutes just as much as any other law.

One can find the textual separation of powers critique as early as Justice Douglas's dissent in *Younger* itself.[72] He cited the Civil Rights Act of 1871 as a direct congressional authorization to hear the case.[73] That statute contains both a right of action—now section 1983—and a grant of jurisdiction over cases within it. While Justice Douglas's brief analysis focuses on section 1983 as an exception to the Anti-Injunction Act,[74] it contains the seeds of future developments.

Particularly important is the presence of section 1983. That statute provides a remedy for the violation of underlying rights found elsewhere, primarily in the Constitution. Without such a statute the ability of litigants to sue to enforce those rights against officials acting under color of state law would be uncertain.[75] Congress not only conferred that ability, but gave the litigant a choice of forum, or at least the clear availability of a federal forum. It did so through the jurisdictional component of the 1871 Act. Thus, while section 1983 is not, strictly speaking, jurisdictional, it represents a congressional choice about remedies that is substantially grounded in Congress's power over the jurisdiction of the federal courts.

Justice Brennan's separate opinions in cases extending the *Younger* doctrine beyond its original context of federal equitable relief against state criminal proceedings represent the major judicial elaboration of the text-based separation of powers critique.[76] He was a

70. *Id.* at 245.

71. Redish, *supra* note 16, at 76-77 (quoting in part Tennessee Valley Auth. v. Hill, 437 U.S. 153, 194 (1978)).

72. Younger v. Harris, 401 U.S. 37, 58 (1971) (Douglas, J., dissenting).

73. *Id.* at 61-62.

74. *Id.* at 60-64 (discussing 28 U.S.C. § 2283).

75. The Court ultimately might have reached this result through the process that it utilized in Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388 (1971). In *Bivens* a majority reasoned that even without a general authorizing statute such as section 1983 a federal court with jurisdiction over the subject matter could award damages against a federal official for a constitutional violation. The analysis relies heavily on the general remedial powers of federal courts. *Id.* at 395-96.

76. *E.g.*, Pennzoil Co. v. Texaco, 481 U.S. 1, 18 (1987) (Brennan, J., concurring in

strong critic of these extensions. He found in section 1983, its jurisdictional counterpart, and the general federal question grant a post-Civil War policy to establish the federal courts as the principal forum for vindicating federal rights.[77] In part this policy is institutional: federal courts may be potentially more fair than state courts in vindicating those rights.[78] In part, however, the forum choice itself is one of the rights the national government has conferred.[79] To vindicate that right the federal courts must exercise the jurisdiction given them. Although Justice Brennan did not use the term separation of powers, it seems fair to apply this label to much of his criticism of *Younger* abstention. The key point for him was the presence of authoritative texts of positive law, emanating from the legislative branch, which the judicial branch must follow.

The major academic development of this critique as a matter of separation of powers is an influential article by Professor Redish.[80] Although he disagrees with *Younger* as a matter of policy,[81] for Redish that is not the important point. He describes arguments for abstention based on comity and federalism as addressed to the wrong forum.[82] The Court cannot entertain these arguments because Congress has settled the issue by conferring jurisdiction. It is Congress's job to make the laws.[83] The Court would violate basic notions of separation of powers if it declined to enforce a substantive law because of disagreement with its policy. The same violation occurs when the Court directs abstention from the exercise of granted jurisdiction in favor of state processes.[84] Like Justice Brennan's approach, the presence of legislative texts is central to Redish's argument. He goes further by analyzing the texts themselves. He finds the grants of jurisdiction "seemingly unlimited."[85]

The text-based form of the separation of powers critique is its most apparent component. In part, the text-based critique rests on the fact that the laws exist, as well as on what they say. Whether the texts, by their own terms, forbid or permit abstention is a difficult

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the judgment); Juidice v. Vail, 430 U.S. 327, 342 (1977) (Brennan, J., dissenting); Huffman v. Pursue, Ltd., 420 U.S. 592, 613 (1975) (Brennan, J., dissenting). For an early and extensive formulation of Justice Brennan's views, see Perez v. Ledesma, 401 U.S. 82, 104 (1971) (Brennan, J., concurring in part and dissenting in part).

77. *E.g., Perez,* 401 U.S. at 106-07 (Brennan, J., concurring in part and dissenting in part).

78. *E.g.*, Steffel v. Thompson, 415 U.S. 452, 464 n.13 (1974).

79. *See, e.g.,* Trainor v. Hernandez, 431 U.S. 434, 455-56 (1977) (Brennan, J., dissenting).

80. Redish, *supra* note 16. The article is an important component of the academic treatment of *Younger* and of abstention in general. *See, e.g.,* Shapiro, *Jurisdiction and Discretion,* 60 N.Y.U. L. REV. 543, 544 (1985) (discussing Professor Redish's article); Wells, *Why Professor Redish is Wrong About Abstention,* 19 GA. L. REV. 1097 (1985).

81. Redish, *supra* note 16, at 72 n.5.

82. *Id.* at 73.

83. *Id.* at 76-77; *see* Lee & Wilkins, *supra* note 8, at 367 (stating that "*Younger* as applied today calls for legislative modification simply to preserve Congress' constitutional authority to delineate the jurisdiction of the lower federal courts").

84. Redish, *supra* note 16, at 76-77.

85. *Id.* at 77-78.

question. Further discussion of this form of the separation of powers critique is postponed for the moment because of the possibility that that critique can be presented in an even more compelling fashion.

It is true that if Congress had not spoken, there would be no question of abstention because the federal court would have no jurisdiction to renounce. The important consideration may be neither what Congress said nor the fact that it said anything at all. An alternative separation of powers objection to *Younger* is that it represents judge-made jurisdictional law, and that in our tripartite system only Congress can make law of this type. As Justice Brennan put it, objecting to the reach of *Younger,* "[t]he power to control the jurisdiction of the lower federal courts is assigned by the Constitution to Congress, not to this Court."[86] Thus, the separation of powers critique can be recast in institutional terms. The point is not that the Court is indirectly violating the Constitution by disobeying the will of Congress but that it is directly violating the Constitution by leaving its own domain and entering that of another branch. Stating the argument in these terms may bring to bear the doctrine of separation of powers in an even stronger form. If the recast critique holds, *Younger* is indeed illegitimate. In fact the institutional critique might render questions of statutory interpretation irrelevant: Congress may lack power to delegate jurisdictional lawmaking to the judicial branch.[87] In order to consider the critique in this form one must consider the relatively new development of an extensive body of "separation of powers law." These cases are particularly relevant to an analysis of the validity of *Younger* solely as a matter of separation of powers.

II. Guidance from the Separation of Powers Cases

During the last decade the Burger-Rehnquist Court decided a number of separation of powers cases.[88] Almost overnight the doctrine evolved from an abstraction to a significant component of operative constitutional law. These cases offer some support for the separation of powers critique of *Younger.*[89] One of their dominant recent themes, however—the need for a flexible approach and a

86. Fair Assessment in Real Estate Ass'n v. McNary, 454 U.S. 100, 125 (1981) (Brennan, J., concurring).

87. For a discussion of delegated lawmaking authority, see Mistretta v. United States, 488 U.S. 361, 383-97 (1989).

88. *See, e.g., id.*; Morrison v. Olson, 487 U.S. 654 (1988); Commodity Futures Trading Comm'n v. Schor, 478 U.S. 833 (1986); Bowsher v. Synar, 478 U.S. 714 (1986); Thomas v. Union Carbide Corp., 473 U.S. 568 (1985); INS v. Chadha, 462 U.S. 919 (1983); Northern Pipeline Constr. Co. v. Marathon Pipeline Co., 458 U.S. 50 (1982).

89. Part III, *infra,* discusses other cases relevant to and somewhat supportive of the critique—those dealing with federalism as a constitutional value and with the limited nature of federal jurisdiction.

sharing of functions among the three branches—suggests that there is room for courts to make jurisdictional law.

In the early Burger Court separation of powers cases, flexibility was not the key. Instead, the Court emphasized the need to confine the three branches to their respective spheres. A good example is *Immigration and Naturalization Service v. Chadha,*[90] in which the Court struck down one-house legislative veto mechanisms. The Court stated its general view that the Constitution "sought to divide the delegated powers of the new Federal Government into three defined categories, Legislative, Executive, and Judicial, to assure, as nearly as possible, that each branch of government would *confine itself to its assigned responsibility.*"[91] The specific ground for the decision was the conclusion that a resolution by one house suspending a decision not to deport an alien was the making of a law, and did not comply with the Article I procedures for the exercise of legislative power.[92] The Court emphasized, however, that these provisions must be seen in a broader context; they "are integral parts of the constitutional design for the separation of powers."[93]

Chadha is striking in its rigidity. The majority emphasized that a strict application of the separation doctrine is the rule even if it operates to strike down important governmental innovations.[94] Indeed, Justice White, in dissent, portrayed the decision as undercutting the constitutional foundations of the modern administrative state.[95] *Chadha* does not stand alone. The same rigidity characterizes *Bowsher v. Synar,*[96] which invalidated the Comptroller General's role under the Balanced Budget Act, and *Northern Pipeline Construction Co. v. Marathon Pipeline Co.,*[97] which invalidated adjudication of bankruptcy disputes by non-Article III judges.

Taken together these cases constitute support for the institutional version of the separation of powers critique of *Younger.* When the Court makes jurisdictional law it is no longer "confin[ing] itself to its assigned responsibility."[98] Congressional power over jurisdiction represents, if anything, more than ordinary lawmaking. It flows from Congress's special responsibility for the business of the federal courts, given the framers' decision not to create a system of lower federal courts but to leave that choice to Congress.

Chadha, Bowsher, and *Northern Pipeline* do not, however, represent

90. 462 U.S. 919 (1983).
91. *Id.* at 951 (emphasis added).
92. *Id.* at 952-59.
93. *Id.* at 946.
94. *Id.* at 959.
95. *Id.* at 984-87 (White, J., dissenting) (discussing the validity of rulemaking).
96. 478 U.S. 714 (1986). In *Bowsher* the Court held that the Comptroller General's role under the Act was executive and that Congress's ability to remove him on grounds broader than those generally applicable to impeachment, gave it too much power over the executive branch. *Id.* at 732-34.
97. 458 U.S. 50 (1982). Although there was no majority opinion in *Northern Pipeline,* the decision appears to rest on the view that certain matters require adjudication in an Article III court at least to a substantial degree. *Id.* at 87.
98. *Chadha,* 462 U.S. at 957.

the last word in the development of separation of powers doctrine. The more recent cases appear to take the flexible approach to the issue called for by Justice White in his early dissents.[99] In *Thomas v. Union Carbide*[100] and *Commodity Futures Trading Commission v. Schor*[101] the Court backed away from *Northern Pipeline* almost to the point of overruling the case.[102] These cases rest on the premise that "an absolute construction of Article III is not possible"[103] as a guide to determining where adjudicatory functions belong. The opinions decry an approach which is "formalistic,"[104] "doctrinaire,"[105] or which uses "bright line" rules.[106] The Court states the general goal of separation of powers as preventing "the encroachment or aggrandizement of one branch at the expense of the other."[107]

The most dramatic example of this flexible approach is *Morrison v. Olson*,[108] the "special prosecutor case." There the Court rejected a number of challenges to the validity of a court-appointed special prosecutor charged with investigating and prosecuting wrongdoing in the executive branch, with very little executive branch control over her actions. The challenges were based both on specific constitutional provisions allocating responsibility and on the doctrine of separation of powers in general. With respect to the latter, the Court invoked Justice Jackson's call for a flexible doctrine[109] and determined that the scheme did not authorize a "usurpation" of executive branch functions[110] by another branch. In *Mistretta v. United States*,[111] the Court upheld the promulgation of sentencing guidelines by the United States Sentencing Commission. Again, in the face of separation of powers challenges, the Court elaborated on the need for a "flexible"[112] approach and determined that the use of the somewhat hybrid Commission would not "either accrete to a single branch power more appropriately diffused among separate branches or . . . undermine the authority and independence of one or another coordinate branch."[113]

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99. *See, e.g., id.*
100. 473 U.S. 568 (1985).
101. 478 U.S. 833 (1986).
102. *See* Brown, *Article III as a Fundamental Value—The Demise of* Northern Pipeline *and Its Implications for Congressional Power*, 49 OHIO ST. L.J. 55 (1988).
103. *Thomas*, 473 U.S. at 583.
104. *Schor*, 478 U.S. at 851.
105. *Thomas*, 473 U.S. at 587.
106. *Id.* at 586.
107. *Schor*, 478 U.S. at 850 (quoting Buckley v. Valeo, 424 U.S. 1, 122 (1976)).
108. 487 U.S. 654 (1988).
109. *Id.* at 694 (quoting Youngstown Sheet and Tube Co. v. Sawyer, 343 U.S. 579, 635 (1952) (Jackson, J., concurring)).
110. *Id.* at 695.
111. 488 U.S. 361 (1989).
112. *Id.* at 381.
113. *Id.* at 382.

The approach of these recent cases generally cuts against the institutional separation of powers critique of *Younger* abstention. It may well be that Congress has a special responsibility for the jurisdiction of the federal courts—an "ultraplenary" power so to speak.[114] It does not follow, however, that that responsibility cannot be shared to any degree.[115] *Younger* abstention flows from a choice by the Court to consider the harmonious functioning of the nation's parallel court systems in determining whether to exercise federal jurisdiction, primarily in the equitable context. It is hard to view this consideration as threatening Congress's integrity or impermissibly accumulating legislative power within the judicial branch. The choices made are closely related to the traditional function of adjudicating cases and controversies. It seems unduly facile to equate the exercise of ungranted jurisdiction with a decision not to exercise what is granted. The former represents an exercise of power given only to Congress by the Constitution. The latter represents a power that might be inherent in courts that possess "the judicial power," and that act according to the precepts of "law and equity." Alternatively, Congress may have delegated the power to decline jurisdiction in the relevant statutes, a point discussed in Part IV below.[116] What is important for institutional separation of powers purposes is Congress's primacy in the area; that is retained by its apparent power to nullify *Younger* or any other abstention doctrine.

Apart from the general bearing of the recent cases on the institutional critique, *Morrison* and *Mistretta* contain important specific discussions of the range of things the judicial branch may do in a system of shared separated powers. In *Morrison* the Court noted that "federal courts and judges have long performed a variety of functions that . . . do not necessarily or directly involve adversarial proceedings within a trial or appellate court."[117] It cited supervision of grand juries and the appointment of private prosecutors for some contempt proceedings.[118] This discussion took place in the context of a challenge to the judiciary's assertedly executive role in the special prosecutor scheme. Far more relevant for present purposes is the promulgation of sentencing guidelines by the Commission at issue in *Mistretta.* The statute places the Commission within the judicial branch and provides that at least three of its seven members must be federal judges.[119] In *Mistretta* a federal criminal defendant sentenced pursuant to the guidelines contended that their promulgation was an impermissible legislative act by the judicial branch. As such Congress could not authorize it. In response, the Court admitted that the guidelines look a lot like laws.[120] They are

114. *Cf.* Pennsylvania v. Union Gas Co., 109 S. Ct. 2273, 2282 (1989) (discussing and rejecting the notion of the Fourteenth Amendment as an ultraplenary grant).
115. *See* Shapiro, *supra* note 80, at 577.
116. *See infra* notes 234-40 and accompanying text.
117. *Morrison,* 487 U.S. at 681 n.20.
118. *Id.*
119. 28 U.S.C. § 991 (1988).
120. *Mistretta,* 488 U.S. at 391.

the major determinants of each sentence and are presumptively binding on federal trial judges. In the words of the Court, they reflect "political judgment about crime and criminality" and have "substantive effects."[121]

This last point is particularly significant. The Court relied in part on the form of judicial rulemaking that the Federal Rules of Civil Procedure represent.[122] Still, the Court seemed to recognize that under a substantive-procedural dichotomy the guidelines fall on the substantive side.[123] This recognition was troubling. The Court emphasized that the guidelines "do not bind or regulate the primary conduct of the public."[124] Even so, the Court seemed to accept the characterization of Justice Scalia who, in dissent, labelled the guidelines "legally binding prescriptions governing application of governmental power against private individuals."[125] The Court was able to overcome its reservations about this lawmaking for two main reasons. First, sentencing represents a "unique context" in that courts have always played a large role in the sentencing process.[126] Second, the Sentencing Commission is not a court and its nonadjudicatory activities do not threaten the "central adjudicatory mission" of the judicial branch.[127]

Even if one accepts these distinctions, *Mistretta* is a separation of powers case that supports the making of rules by the judicial branch that pertain to the disposition of cases by the federal judiciary. One could apply the definition, at some level of generality, to the *Younger* doctrine. While it is true that there was a delegation issue in *Mistretta,* the case did not involve the question of whether Congress had or had not delegated the power to promulgate guidelines. The question was whether it could.[128] As with the institutional critique of *Younger,* the question was whether notions of separation of powers barred the courts from performing the activity. If courts cannot do so, then a statute purportedly authorizing it must either be construed not to authorize it or be struck down. The same considerations relate to any claim that the Constitution is the source of

121. *Id.* at 393.
122. *Id.* at 388, 391.
123. *Id.* at 392-93.
124. *Id.* at 396.
125. *Id.* at 413 (Scalia, J., dissenting).
126. *Id.* at 396.
127. *Id.* at 393-94 & n.20. Summing up, the Court stated that "since substantive judgment in the field of sentencing has been and remains appropriate to the Judicial Branch, and the methodology of rulemaking has been and remains appropriate to that Branch, Congress' considered decision to combine these functions in an independent Sentencing Commission and to locate that Commission within the Judicial Branch does not violate the principle of separation of powers." *Id.* at 396-97.
128. There was also the classic delegation question of whether Congress had laid down an intelligible standard. *Id.* at 371-79.

judicial authority, such as the argument that Article III's grant of the "judicial power" authorizes *Younger*. Of course an exercise of power authorized by Article III cannot violate the Constitution.[129] The point is that if an assertion of judicial power was totally at variance with the underlying scheme of separation of powers, the Court would find it outside of Article III.

It thus becomes relevant to ask whether the jurisdictional law that *Younger* represents is so clearly within the Article I legislative domain that an Article III court cannot fashion it. One might begin with *Chadha*'s definition of legislation subject to Article I as "action that [has] the purpose and effect of altering the legal rights, duties, and relations of persons . . . outside the Legislative Branch."[130] This definition is not watertight. Much adjudication by common law courts has the same effect, but the relevant point is that what the courts do in *Younger* cases does not meet this definition. Abstention by one forum from adjudicating rights in favor of an equally competent forum does not alter such rights. It does not "regulate . . . primary conduct" as that term is used in *Mistretta*.[131] The reference to primary conduct reflects notions of social contract that laws that bind one person to another can only come from the elected legislature.[132]

On closer examination, however, doctrines of access to courts are closer to the core legislative function than these initial observations indicate. To begin with, they are forms of power allocation within the federal system. The power in question is that of resolving disputes. Under the constitutional scheme such allocational questions are either resolved by the Constitution itself or assigned to Congress. Congress may exercise it by inaction, thus leaving a matter in the hands of the states, or by acting to federalize the matter in whole or in part. The point is that power allocation decisions are so fundamental that only Congress can make them.[133]

Moreover, one should not be too quick to separate questions of rights from questions of access to a particular set of courts to enforce those rights. Access doctrines can affect rights by disfavoring their enforcement.[134] *Younger* may be shielded from this criticism by the presence of some inquiry by the federal court into whether the

129. *Cf.* Morrison v. Olson, 487 U.S. 654, 678-79 (1988) (stating that because the judges' power to appoint an independent counsel is derived from the Constitution, it cannot violate the Constitution).

130. INS v. Chadha, 462 U.S. 919, 952 (1983).

131. *Mistretta*, 488 U.S. at 396.

132. Obviously the phenomenon of common law adjudication runs counter to these notions. At the federal level, analysts have devoted considerable attention to the legitimacy of judge-made law. *See, e.g.*, Merrill, *The Common Law Powers of Federal Courts*, 52 U. CHI. L. REV. 1, 46-47 (1985).

133. Of course, the courts make power allocation decisions through interpretation, but these decisions are not presented as policy choices.

134. *See* Levit, *supra* note 4, at 363 (stating that "curtailment of federal jurisdiction works against the disadvantaged and powerless classes"); Wells, *Is Disparity a Problem?*, 22 GA. L. REV. 283 (1988).

alternative forum is adequate.[135] In the context of section 1983, however, the ability to enforce a federal right in federal court is itself a right—one which the rightholder may regard as of great value, and one which *only* Congress can create.[136] Abstention takes this right away.

Stated in this fashion the institutional separation of powers critique has force. Still, the major theme of the recent cases is a system of shared powers with a good deal of interaction over a range of matters. In *Mistretta* the Court alluded to "a 'twilight area' in which the activities of the separate Branches merge."[137] If sentencing guidelines which must be followed are part of that area, it may well be that rules about declining to exercise granted jurisdiction are as well. Congress and the judiciary share responsibility for the issue. The courts have an important contribution to make; one which Congress may want factored into the equation.[138] If Congress disagrees, it retains the final say. Putting aside whether Congress has spoken, the fact of judicial action does not by itself seem either an undue incursion or an undue aggrandizement.

There is one additional aspect of the recent cases that may be relevant to the separation of powers critique of *Younger*. The lesson of the cases is that in any conflict over power allocation the Court will show great deference to Congress's position. One might state this simply in terms of the results: the cases favor innovative governmental approaches and these approaches will generally come from Congress. The change in result, however, reflects a change in attitude toward the balance of power among the branches. In *Chadha* and *Bowsher* the Court saw the accretion of power in Congress as a danger. In *Chadha,* for example, Chief Justice Burger invoked "the profound conviction of the Framers that the powers conferred on Congress were the powers to be most carefully circumscribed."[139] It was Justice White, dissenting in *Chadha,* who invoked the Necessary and Proper Clause to argue the contrary position that Congress should possess great leeway when acting in its domain.[140]

The position of Justice White dominates the "flexible cases."

135. *E.g.,* Juidice v. Vail, 430 U.S. 327, 337 & n.14 (1977) (discussing federal plaintiff's opportunity to present federal claims). It should be noted, however, that the Court has moved toward a strong presumption that state procedures are adequate. *See* Althouse, *supra* note 49, at 1063-65.

136. There is, of course, the possibility that the Court would have reached the section 1983 result through *Bivens*-style federal common law. *See* Wells, *supra* note 80, at 1102-03; *supra* note 75.

137. Mistretta v. United States, 488 U.S. 361, 386 (1989).

138. *Cf. id.* at 408 ("As part of . . . reciprocity and as part of the integration of dispersed powers into a workable government, Congress may enlist the assistance of judges in the creation of rules to govern the Judicial Branch.").

139. INS v. Chadha, 462 U.S. 919, 947 (1983).

140. *Id.* at 983-84 (White, J., dissenting).

They are replete with references to Congress's familiarity with the problem at hand and indications that the Court must defer to its choice of solution.[141] The reason for abandoning formalistic separation of powers analysis is that it might "unduly constrict Congress' ability to take needed and innovative action pursuant to its Article I powers."[142] Indeed, deference may not stop there. The Court has suggested that an overriding need for Congress to promote objectives within its authority can trump otherwise applicable separation of powers constraints. Thus, in *Thomas v. Union Carbide Agricultural Products Co.*[143] the Court stated that "the requirements of [Article] III must in proper circumstances give way to accommodate plenary grants of power to Congress to legislate with respect to specialized areas."[144] If Congress is the body that decides what circumstances are proper, flexible separation of powers is a paper tiger. Even short of viewing the controversies as nonjusticiable, the law of separation of powers looks like the law of deference. It may represent a natural evolution in the views of a majoritarian Court.

This development might be seen as support for the institutional separation of powers critique of *Younger*. Deferential analysis exalts the role of Congress with respect to the other branches. As far as federal court jurisdiction is concerned, however, a partial response is that we already knew that Congress is dominant. It alone has the power to confer jurisdiction. Equally important is the fact that the deferential analyses are all triggered by congressional action that may conflict with the authority of another branch. The recent separation cases' emphasis on deference does not lend much support for the institutional critique that the Court cannot formulate jurisdictional policy. Its relevance, if any, is to the textual critique that Congress has foreclosed this formulation.

Indeed, taken as a whole, the thrust of the recent separation of powers cases is to undermine seriously the institutional critique. Notions of shared power and flexibility support the kind of jurisdictional policymaking that *Younger* represents. Thus, the cases most relevant to the separation of powers critique do not support it in what seemed its strongest form: the institutional formulation. If the critique is "seemingly irrefutable,"[145] that conclusion must stand or fall on the text of the relevant statutes. Before turning to the textual critique it will be helpful to consider two other bodies of relevant case law: state sovereignty and the limited nature of federal jurisdiction. These cases shed light on, respectively, relationships between separation of powers and federalism and the roles of the Court and Congress in matters of federal jurisdiction. They provide more support for the separation critique than do the separation cases.

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141. *E.g.*, Commodity Futures Trading Comm'n v. Schor, 478 U.S. 833, 845-46 (1986).

142. *Id.* at 851.

143. 473 U.S. 568 (1985).

144. *Id.* at 590-91 (citing Palmore v. United States, 411 U.S. 389, 407-08 (1973)).

145. Redish, *supra* note 16, at 77-78.

III. Burger-Rehnquist Court Federalism and the Limited Nature of Federal Jurisdiction

A. Federalism

The link between *Younger* abstention and other federalism issues has been noted frequently.[146] An important example is the substantive federalism of *National League of Cities v. Usery*.[147] In that case the Court held that in areas of traditional state sovereignty the Constitution limits the federal government's power to regulate "the States as States."[148] *National League of Cities* might be read either as establishing zones of state autonomy[149] or as utilizing a balancing test[150] to determine when federal regulation prevails. Nine years later the Court rejected both approaches and overruled *National League of Cities* in *Garcia v. San Antonio Metropolitan Transit Authority*.[151] *Garcia* rests on the notion that the primary protections of state sovereignty are to be found in the Constitution's limited grants of power to the national government and in the national political process.[152] It is not the role of the judiciary to identify and protect areas of state autonomy.[153]

One might argue that the abandonment of *National League of Cities* presages the abandonment of *Younger*. The two cases were seen as closely related.[154] Each represents an effort to harmonize state and national interests by preventing national institutions from riding roughshod over the states' interests. Each represents a judicially-formulated doctrine to protect those interests. Indeed, in *National League of Cities* the Court seems to equate the states with a coordinate branch of the national government.[155] Ultimately the Court has backed down in apparent recognition of Congress's predominant role within the branches and between the levels when it comes to charting the contours of the federal system. In particular, *Garcia* casts grave doubt on the legitimacy of any judicial role in allocating power within the federal system or in protecting state institutions

146. *E.g.*, Tribe, *Unraveling* National League of Cities: *The New Federalism and Affirmative Rights to Essential Government Services*, 90 HARV. L. REV. 1065, 1099-1100 (1977).
147. 426 U.S. 833 (1976), *overruled*, Garcia v. San Antonio Metro. Transit Authority, 469 U.S. 528 (1985).
148. *Id.* at 845.
149. *See id.* at 852 (referring to states' "freedom to structure integral operations in areas of traditional governmental functions").
150. *See id.* at 856 (Blackmun, J., concurring) (noting that the Court seems to adopt a balancing approach).
151. 469 U.S. 528 (1985).
152. *Id.* at 547-54.
153. *Id.* at 552.
154. Tribe, *supra* note 146, at 1099-1100.
155. *National League of Cities*, 426 U.S. at 849 (noting that a state is "a coordinate element in the system established by the Framers for governing our Federal Union"), *overruled*, Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528 (1985).

from national power.[156]

There are, however, two crucial distinctions between this context and *Younger*. In *Garcia* there was no doubt about the congressional command. Congress had foreclosed the operation of state institutional choices over how much to pay specified employees. Moreover, the Court was engaged in substantive constitutional interpretation in resolving the question of possible limits on Congress's ability to do so. *Younger* represents a judge-made law of federal-state judicial relations. *Garcia* sheds little if any light on the institutional legitimacy of this exercise. *Younger* represents neither an attempt to limit Congress nor the kind of constitutional adjudication which *Garcia* renounced. To say that Congress is supreme points, once again, only to the statutory texts.

B. Limited Federal Jurisdiction

There remain for consideration a number of cases in which the Court has considered judicial power over federal jurisdiction. This body of law includes many of the numerous decisions in which the Burger-Rehnquist Court has developed a restrictive approach to federal jurisdiction. Although some critics may view federalism as the driving force behind this approach,[157] the doctrine of separation of powers plays an equal role.[158] Indeed, it is a major theme of the recent jurisdiction cases, as are the related notions of limited federal jurisdiction and deference to Congress as its allocator. The cases are highly relevant to the separation of powers critique of *Younger* in part for these reasons and in part because they come from the same wing of the Court as do the extensions of *Younger*.[159] Several aspects of the jurisdiction cases support the separation of powers critique to a far greater extent than the separation of powers cases themselves.

The notion of the limited nature of federal jurisdiction extends beyond cases that deal only with jurisdiction. It can be found as well in discussion of such matters as federal common law,[160] implied rights of action,[161] and the availability of *Bivens* damages remedies for violation of constitutional rights by federal officials.[162] The common theme is the limited nature of the federal judicial business and the Court's reluctance or lack of power to extend the judicial reach. The notion of limited authority furthers separation of powers values in emphasizing Congress's control over the operation of the federal courts and its role as the maker of law. It also furthers federalism

156. *Garcia*, 469 U.S. at 552, 556-57.

157. *E.g.*, Amar, *supra* note 9, at 1425-26.

158. *See, e.g.*, Brown, *Of Activism and* Erie*—The Implication Doctrine's Implications for the Nature and Role of the Federal Courts*, 69 IOWA L. REV. 617, 630-31, 636 (1984).

159. Redish, *supra* note 16, at 82 n.20, 83-84.

160. *E.g.*, Cannon v. University of Chicago, 441 U.S. 677, 717-18 (1979) (Rehnquist, J., concurring).

161. *Id.* at 746 (Powell, J., dissenting).

162. Carlson v. Green, 446 U.S. 14, 37-44 (1980) (Rehnquist, J., dissenting).

values in emphasizing the states' role in the national legislative process, as opposed to the federal judiciary, and the supposedly limited nature of all federal power.[163]

The cases deal with a wide range of issues and can be divided into a number of groups, of which two will be considered here. The first involves the interrelated issues of federal common law, implied rights of action, and *Bivens* remedies. Here the Court takes the position that a particular enlargement of the federal role is not beyond Article III, and that the judiciary might possess power to effectuate it, but that separation concerns counsel "hesitation" until Congress has given an authorization to go ahead.[164] Federal common law is a good example. Although the Court demonstrates ambivalence,[165] its general approach is not to encourage the judicial fashioning of federal law. In *City of Milwaukee v. Illinois*[166] Justice Rehnquist cited *Erie*[167] for the proposition that "[f]ederal courts, unlike state courts, are not general common-law courts and do not possess a general power to develop and apply their own rules of decision."[168] His opinion illustrates how *Erie* concerns can be stated in terms of separation of powers as well as federalism. Congress not only possesses democratic legitimacy; it is the body in the best position "to develop national policy in areas governed by federal common law."[169]

This analysis is highly relevant to the institutional critique of *Younger*. It reinforces the notion of Congress as primary lawmaker. More importantly, it casts doubt upon the legitimacy of federal common law unless circumstances are such that federal courts are "compelled" to formulate it.[170] To the extent that *Younger* is seen as federal common law this exacting test may not be met. *City of Milwaukee* can be read to support both the institutional and text-based critiques. Congress had addressed the problem of environmental law that was before the Court. For Justice Rehnquist that meant

163. Whether national power is in fact limited very much, given expansive readings of Article I powers is a debatable question. *See* Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 587-88 (1988) (O'Connor, J., dissenting) (discussing the "unprecedented growth of federal regulatory activity").

164. The phrase is taken from Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388 (1971), where the Court referred to the possibility of "special factors counselling hesitation in the absence of affirmative action by Congress." *Id.* at 396. It is, however, applicable to the Court's general approach to the broad area discussed here.

165. *See* Boyle v. United Technologies Corp., 487 U.S. 500, 504-06 (1988) (creating federal common law with regard to government contractors).

166. 451 U.S. 304 (1981).

167. Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1938).

168. *City of Milwaukee*, 451 U.S. at 312 (citing *Erie*, 304 U.S. at 78).

169. *Id.* at 313. The quote is to the effect that courts are not better suited in the environmental area than they are in others, but the clear implication is that Congress is the body to make national policy in all areas.

170. *Id.* at 314.

that the federal courts should stay out, not as a matter of the will of Congress, but out of preference for legislative solutions.[171] Quoting in part from *Tennessee Valley Authority v. Hill*[172] he emphasized that the question was not one of prohibition of federal common law but of the role of statutes that speak "directly"[173] to a problem: "[o]ur 'commitment to the separation of powers is too fundamental' to continue to rely on federal common law 'by judicially decreeing what accords with "common sense and the public weal" ' when Congress has addressed the problem."[174] One could apply much the same analysis to a matter which Congress has addressed through section 1983 and the jurisdictional statutes.[175] The existence of relevant legislative texts forecloses judicial action along the lines of *Younger.*

The Court's recent cases on implied rights of action also strengthen the separation of powers critique of *Younger.* The issue arises when a federal statute imposes a duty but does not provide for any private enforcement of it. A private plaintiff who seeks judicial recourse to redress a violation of that duty asks the court to imply from the statute a private right to sue to enforce it. The Supreme Court's recent trend has been to decline to find private rights of action.[176] It sometimes has reached this result as a matter of statutory construction, using analyses that suggest that it might find a private right but that plaintiffs face an uphill burden.[177] Perhaps the same strict approach to statutory construction argues against finding authority to formulate abstention doctrine.[178]

For several Justices the implied right cases also present fundamental issues of separation of powers. The major statement of this view is Justice Powell's dissent in *Cannon v. University of Chicago,*[179] a dissent that may now reflect the prevailing law.[180] He saw the implication of a right of action as opening the door to a case that otherwise could not have been brought in federal court. For the Court to do so would invade Congress's power over jurisdiction.[181] Moreover, the formulation of a remedial scheme represents "policymaking authority vested by the Constitution in the Legislative

171. *See id.* at 314-15.

172. 437 U.S. 153, 195 (1978).

173. *City of Milwaukee,* 451 U.S. at 315.

174. *Id.* (quoting Tennessee Valley Auth. v. Hill, 437 U.S. at 195).

175. *See* Redish, *supra* note 16, at 83-84. Professor Redish notes the irony that then-Justice Rehnquist was the author of *City of Milwaukee* and is a "staunch advocate of judge-made abstention." *Id.* at 83.

176. *E.g.,* Thompson v. Thompson, 484 U.S. 174 (1988).

177. In *Thompson* the Court indicated considerable reluctance to imply a right of action, but stated that it would not utilize an analysis that would make the doctrine a "dead letter." *Id.* at 179.

178. *See* Redish, *supra* note 16, at 78 n.42.

179. 441 U.S. 677, 730 (1979) (Powell, J., dissenting).

180. *See* Transamerica Mortgage Advisors v. Lewis, 444 U.S. 11, 25 (1979) (Powell, J., concurring).

181. *Cannon,* 441 U.S. at 730-31 (Powell, J., dissenting).

Branch."[182] The Court should neither make these choices for Congress nor should it upset the choices made. The refusal to imply a remedy can be seen as another example of refusal to make federal common law. Likewise, the Court's implication analysis supports the separation of powers critique in both its forms. The analysis employs the general theme of institutional deference in matters of the business of the federal courts. It also emphasizes the specific point of leaving intact the degree of enforcement structured by Congress in complex statutory schemes. As Professor Redish points out with respect to jurisdictional statutes, "[w]hile judicial creation of private rights of action can undermine a carefully structured statutory goal only indirectly, judicial lawmaking through abstention can very directly undermine that goal."[183]

The presence of congressional action also plays an important role in another set of cases that belong in this group: those in which the Court denies a *Bivens* damages remedy for violations of constitutional rights by federal officials.[184] No statute authorizes these remedies—there is no federal counterpart to the generalized right to sue which section 1983 provides against state and local officials. Nonetheless, in *Bivens* the Court held it within the judiciary's inherent authority to award damages against federal officials for a Fourth Amendment violation.[185] The Court viewed this award as a natural consequence of the fact that it had jurisdiction and an established authority to award equitable relief.[186] The Court stated, however, that it might decline to award damages if Congress had directly precluded this relief or if there were any "special factors counselling hesitation."[187]

Recent cases have focused on this latter exception in denying *Bivens* remedies.[188] It is congressional action that is the special factor. As in the federal common law area, however, it is not specific displacement of the courts, but the establishment of a remedial scheme by Congress that might give the plaintiff some relief.[189] In the military context it may be that Congress's special competence and expertise are enough by themselves,[190] but the general pattern is to note legislative competence whatever the area and the manifestation of congressional concern through the provision of some remedy. As

182. *Id.* at 743.
183. Redish, *supra* note 16, at 114-15.
184. *E.g.*, Bush v. Lucas, 462 U.S. 367, 390 (1983).
185. Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 391-97 (1971).
186. *Id.* at 396.
187. *Id.*
188. *E.g.*, Schweiker v. Chilicky, 487 U.S. 412, 421-23 (1988).
189. *See* Bush v. Lucas, 462 U.S. 367, 385-86 (1983).
190. *See* United States v. Stanley, 483 U.S. 669, 679 (1987).

the Court said in *Schweiker v. Chilicky,*[191] "[w]hen the design of a Government program suggests that Congress has provided what it considers adequate remedial mechanisms for constitutional violations that may occur in the course of its administration, we have not created additional *Bivens* remedies."[192] It is important to note that deference extends to the exact measure of relief Congress has provided, including no relief at all for constitutional violations, at least if Congress's inaction may "not [have] been inadvertent."[193]

The Court's attitude toward Congress resembles its attitude in the federal common law and implied right cases, but is even more striking given the fact that the Court continues to maintain that judicial power to grant the remedy exists,[194] and that the decision among remedies seems to be a core judicial function.[195] Moreover, what is involved is remedies for constitutional violations; an area in which the judiciary has a special role and expertise.[196] Again, the textual separation critique in particular derives force. The existence of a statute forecloses judicial action. However, none of the cases considered thus far involves direct construction of a statute as telling the courts not to act.

In this respect, a second group of jurisdiction cases may be relevant: those in which the Court has denied access to a federal court based on construction of a jurisdictional statute. In *Owen Equipment & Erection Co. v. Kroger*[197] the Court refused to let a diversity plaintiff assert a complaint against a third-party defendant from the same state. Concepts of ancillary and pendent jurisdiction developed in cases such as *United Mine Workers v. Gibbs*[198] might have permitted this action,[199] but the Court found in the diversity statute a "basic rule" of complete diversity.[200] Allowing the plaintiff to take advantage of the defendant's third-party complaint would circumvent this rule and thus frustrate Congress's policy. The Court reasoned that as a general matter, "[i]t is a fundamental precept that federal courts are courts of limited jurisdiction. The limits upon federal jurisdiction, whether imposed by the Constitution or by Congress, must be neither disregarded nor evaded."[201]

A somewhat similar issue arose in *Aldinger v. Howard,*[202] in which the plaintiff sought to assert pendent party jurisdiction against an entity the plaintiff could not have sued directly under the main federal claim. That entity was a county that at the time was beyond the

191. 487 U.S. 412 (1988).
192. *Id.* at 423.
193. *Id.*
194. *See* Bush v. Lucas, 462 U.S. 367, 374 (1983).
195. *See* Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 405-06 (1971) (Harlan, J., concurring).
196. *See* Schweiker v. Chilicky, 487 U.S. 412, 443 (1988) (Brennan, J., dissenting).
197. 437 U.S. 365 (1978).
198. 383 U.S. 715 (1966).
199. *Kroger,* 437 U.S. at 371 n.10.
200. *Id.* at 377.
201. *Id.* at 374.
202. 427 U.S. 1 (1976).

reach of section 1983.[203] Thus the plaintiff could not assert federal question or civil rights jurisdiction against it, and there was no diversity. The Court described the attempt to bring the county in on a state claim pendent to the main federal claim against a different defendant as an invitation to the federal courts "to fashion a jurisdictional doctrine under the general language of Art. III enabling them to circumvent [the] exclusion, as long as the civil rights action and the state-law claim arise from a 'common nucleus of operative fact.' "[204] The Court declared that a "fair reading" of the two statutes argued against jurisdiction in light of the congressional purpose to exclude counties from section 1983 suits.[205]

The 1989 decision in *Finley v. United States*[206] casts doubt on the general validity of pendent-party jurisdiction. The plaintiff had brought suit against the United States under the Federal Tort Claims Act.[207] The Court refused to allow her to join as defendants nonfederal parties who were citizens of her state. The majority did not rely on any congressional intent to exclude them, but on the fact that "no independent basis of jurisdiction exist[ed]."[208] *Aldinger* was read as establishing a general proposition: "that the *Gibbs* approach would not be extended to the pendent-party field."[209] The Court seemed to say that parties, as opposed to claims, cannot be brought before a federal court unless Congress has explicitly authorized it.[210] This reasoning rules out any notion of pendent parties, at least if the definition of pendent resembles "closely related to the original case, but not part of that case *as Congress defined it.*"

Owen, Aldinger, and *Finley* are significant in that they arose in an area where judicial creativity in matters of jurisdiction has been noteworthy: pendent and ancillary jurisdiction. They show that jurisdictional statutes and the policies embodied in those statutes can block the formulation and utilization of judge-made doctrines about jurisdiction. As such, these cases support the separation of powers critique at least in its textual form. Of course, the denials of jurisdiction at issue in the last group of cases discussed further the policy of limitedness. The quote from *Kroger* reminds us that this policy is

203. *Id.* at 17. *But see* Monell v. Department of Social Servs., 436 U.S. 658, 663-65, 690 (1978) (reversing prior law and holding that political subdivisions are "persons" that can be sued under section 1983).

204. *Aldinger,* 427 U.S. at 16 (quoting United Mine Workers v. Gibbs, 383 U.S. 715, 725 (1966)).

205. *Id.* at 17.

206. 109 S. Ct. 2003 (1989).

207. 28 U.S.C. §§ 1346(b), 2671-2680 (1988).

208. *Finley,* 109 S. Ct. at 2008.

209. *Id.* at 2010.

210. *Id.* (stating as a rule "that a grant of jurisdiction over claims involving particular parties does not itself confer jurisdiction over additional claims by or against different parties").

fundamental and that its origins are found both in statutes and in the Constitution itself.

Younger abstention certainly does not violate the policy of limited federal court jurisdiction. To that extent, the cases discussed in this subpart can be distinguished from *Younger*. (This should not be read as stating the perverse argument that *Younger* furthers limitedness by ousting plaintiffs from federal court.) One way to read the cases is that they stand for the proposition that expansion of federal jurisdiction must come, if permissible at all, from Congress. The emphasis is on Congress's role as the conferrer of jurisdiction rather than on any role as exclusive measurer of exact degree. The jurisdictional cases, however, do emphasize the importance of what Congress has said. Their primary relevance to this Article is as support for the text-based critique. Analysis now turns to that question.

IV. Congressional Text and Judicial Duty

One can find numerous statements by the Court and by individual Justices that the federal courts are under a "duty" to exercise any jurisdiction that Congress has vested in them.[211] In its strongest form, the language indicates that this duty derives from the Constitution.[212] If so, that would be the end of *Younger* and any other form of abstention. A federal court with jurisdiction would have to exercise it. While duty there may be, however, it is hard to see how it comes from the Constitution. That document does not confer jurisdiction on the lower federal courts. Congress has the power to create them, or not, and to allocate their jurisdiction.[213] Unless one reads the Constitution as mandating that Congress vest all jurisdiction, that body must have power to decide how much jurisdiction the lower courts have and whether they are under any duty to exercise it.

For purposes of *Younger* abstention three statutes are directly relevant. Section 1331 of title 28 provides that "[t]he district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States."[214] Section 1343 of title 28 provides, in part, that they "shall have original jurisdiction of any civil action authorized by law to be commenced by any person" to redress deprivation under color of state law of federal constitutional rights and some statutory rights.[215] Neither statute contains a jurisdictional amount.[216] Section 1983 of title 42 states

211. *E.g.*, England v. Louisiana State Bd. of Medical Examiners, 375 U.S. 411, 415 (1964) (quoting Willcox v. Consolidated Gas Co., 212 U.S. 19, 40 (1909)); Kline v. Burke Constr. Co., 260 U.S. 226, 234 (1922).

212. *E.g.*, Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 404 (1821); *see* Levit, *supra* note 4, at 362 (federal courts have "a constitutional obligation to exercise jurisdiction").

213. *See* C. WRIGHT, *supra* note 2, at 32-39.

214. 28 U.S.C. § 1331 (1988).

215. 28 U.S.C. § 1343(a)(3) (1988).

216. The civil rights jurisdiction section has never contained a jurisdictional amount. The $10,000 minimum in federal question cases was abolished in 1980. Federal Question Jurisdictional Amendments Act of 1980, Pub. L. No. 96-486, 94 Stat. 2369; *see* C. WRIGHT, *supra* note 2, at 123-24.

that any person who, acting under color of state law, deprives any person of federal constitutional or statutory rights "shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."[217]

The statutes do not in express terms speak to *Younger* abstention or similar judicial action. That is neither surprising nor dispositive. They are broad-based, general jurisdictional and remedial grants declining with matters of inclusion not exclusion. The notion that they forbid *Younger* might be restated in any of five different ways. The jurisdictional statutes can be read to impose a duty, through the word "shall," to hear all the cases they cover.[218] The statutes together can be read as creating a set of federal remedies for federal rights and assuring the availability of a federal forum to vindicate them.[219] The remedial choice is directly bound up with the remedies and rights. Indeed, the ability to choose a federal forum can be viewed as a right in and of itself.[220] Alternatively, one can argue that taken together with other sections of the judicial code, the statutes are part of a complex legislative scheme in which Congress has addressed the question of when federal courts should *not* take jurisdiction as well as when they should.[221] Finally, drawing on the federal common law cases, it may be enough that they exist.[222]

Without for now distinguishing among these possible readings let us consider two opposing views of how to approach the statutory framework: literalist and nonliteralist. For Professor Redish the statutes mean what they say. Fairly read, they forbid *Younger* because "[t]he language of the relevant statutes leaves no room for judicial limitation or modification."[223] The emphasis here is not only on the text and the use of "shall";[224] historical context and legislative purpose are important as well. Congress created the section 1983 remedy and established the civil rights and general federal question jurisdiction of the district courts in part out of distrust of state courts as enforcers of federal rights.[225] In this respect it is important to recognize that section 1983 makes federal rights a

217. 42 U.S.C. § 1983 (1988).

218. *See* Redish, *supra* note 16, at 112-13 & n.185.

219. *See id.* at 115 (stating that the power to make substantive policy includes the power to ensure the availability of a federal forum).

220. *See* Fair Assessment in Real Estate Ass'n v. McNary, 454 U.S. 100, 125 (1981) (Brennan, J., concurring in the judgment) (quoting England v. Louisiana State Bd. of Medical Examiners, 375 U.S. 411, 415 (1964) and Willcox v. Consolidated Gas Co., 212 U.S. 19, 40) (1909)).

221. *See* Redish, *supra* note 16, at 81.

222. Proponents of the separation of powers critique generally advocate one of the first four readings.

223. Redish, *supra* note 16, at 84.

224. *Id.* at 112 n.185.

225. *Id.* at 73 n.15; *see also* Merrell Dow Pharmaceuticals v. Thompson, 478 U.S. 804,

sword in the hands of plaintiffs. *Younger* abstention remits them to state proceedings in which they are generally defendants and can assert those rights only as a shield.

Those who disagree with Professor Redish have advanced a number of alternative nonliteralist approaches. Perhaps the most radical is that of Professor Wells who asserts that statutory issues are largely irrelevant.[226] He views abstention as "a judge-made forum rule for a judge-made cause of action."[227] His thesis is that the Court developed the generalized section 1983 remedy—as opposed to actions which further the statute's purpose of protecting the civil rights of newly freed blacks—outside of the statutory context, much as it developed *Bivens* remedies.[228] There are certainly similarities between section 1983 and *Bivens*,[229] although the *Bivens* dissenters suggested that the existence of a statute authorizing damage actions against state officials removed any separation of powers obstacles that faced actions against federal officials.[230] Moreover, Professor Wells makes a helpful point in putting a federal common law gloss on much of what has been done under section 1983[231] as well as on *Younger* and other abstention doctrines. Still, the Court treats its major section 1983 cases as problems in statutory construction.[232] The very breadth of the statute makes extremely difficult Professor Wells's assertion that "Congress has never enacted a statute granting a general right to recover damages or injunctive relief from state officers or governments for constitutional violations."[233] Section 1983 certainly looks like one.

An alternative response to Professor Redish's strict reading of the statutes is to view them as important, even central, but not as providing definitive answers or as constituting the only source to which one must look to resolve questions of abstention and similar matters. Professor Shapiro and others present the statutes as "organic" laws[234]—"open textured"[235] parameters within which the courts operate. Moreover, it makes sense under this view to consider Congress as having enacted them against a background of traditions and

827 n.6 (1986) (Brennan, J., dissenting) (stating that Congress conferred federal question jurisdiction because of "its belief that state courts are hostile to assertions of federal rights").

226. Wells, *supra* note 80, at 1098.

227. *Id.*

228. *Id.* at 1102-03.

229. *See* Brown, *Letting Statutory Dogs Wag Constitutional Tails—Have the* Bivens *Dissenters Prevailed?*, 64 IND. L.J. 263, 263-66 (1989).

230. *E.g.*, Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 427-28 (1971) (Black, J., dissenting). The views of the *Bivens* dissenters are particularly important in that the current Court takes a similar position. *See* Brown, *supra* note 229, at 264, 274-78.

231. Wells, *supra* note 80, at 1101-07.

232. *E.g.*, Monell v. Department of Social Servs., 436 U.S. 658, 690 (1978).

233. Wells, *supra* note 80, at 1132.

234. Shapiro, *supra* note 80, at 574.

235. Bator, *The State Courts and Federal Constitutional Litigation*, 22 WM. & MARY L. REV. 605, 622 n.49 (1981).

understandings about how courts operate.[236] Professor Shapiro argues for the existence of a significant tradition of judicial discretion over jurisdictional matters in both law and equity. For him "the question whether a court must exercise jurisdiction and resolve a controversy on its merits is difficult, if not impossible, to answer in gross."[237]

There is textual support for this flexible view. Section 1983 does say a violator of rights "shall be liable," but the plaintiff's recourse is proceedings in "law," or "equity,"[238] seemingly incorporating whatever discretion inheres in those systems. Similarly, the jurisdictional statutes say that the district courts "shall have . . . jurisdiction,"[239] but if the emphasis is placed on "jurisdiction," rather than "shall," the question again arises whether that is not a term incorporating some content of discretion. Moreover, the jurisdictional statutes relate to the fundamental Article III grant of "judicial power" which courts having jurisdiction possess. There is surely room in this concept for some discretion over jurisdiction and related matters. In the face of these textual arguments Professor Redish is unmoved. He dismisses them as "puzzling and vague,"[240] and insists on a straightforward, literal reading. In support of his position one might ask whether sound principles of draftsmanship require Congress to write statutes that say something like "the district courts shall have original jurisdiction, they shall exercise it, and we mean it."

Still, there is some room for disagreement over the text-based critique of *Younger*. In part the matter depends on the separation of powers philosophy with which one approaches the matter. An advocate of strict, compartmentalized separation of powers might ask whether the statutes *delegate* discretionary authority to abstain out of concerns of comity and federalism. Posed this way, the question does not easily yield an affirmative answer given the mandatory language and the relevant historical context. The statutes can be said to confer jurisdiction with sufficient force that they create a strong presumption against declining to exercise it.[241] On the other hand, consider the bearing of the flexible doctrine of separation of powers

236. *See* Jackson, *The Supreme Court, the Eleventh Amendment, and State Sovereign Immunity*, 98 YALE L.J. 1, 114 (1988) (noting that general jurisdictional statutes are enacted "against a background understanding of sovereign immunity"). Professor Jackson's Eleventh Amendment analysis is extremely helpful in the *Younger* context as well.

237. Shapiro, *supra* note 80, at 574. Under this view, the development of federal jurisdictional policy is a form of dialogue between Congress and the Court. *See* Fallon, *The Ideologies of Federal Courts Law*, 74 VA. L. REV. 1141, 1248-50 (1988); *infra* note 267.

238. 42 U.S.C. § 1983 (1988).

239. 28 U.S.C. §§ 1331, 1332 (1988).

240. Redish, *supra* note 16, at 84.

241. The notion of such a presumption is an important element of Professor Redish's analysis. *See id.* at 78-79.

that has dominated the Court's recent decisions in this area. This approach emphasizes shared functions, with cooperation and interaction between the branches as the norm, while Congress is the dominant authority. From this perspective one might phrase the question as whether the statutes *withdraw* or *prohibit the exercise of* authority that the courts would normally derive from such concepts as "law and equity," the "judicial power," and "jurisdiction." Viewed this way the statutes do leave room to maneuver. It is also important that Congress retains the final say and can abolish *Younger*. The point is not a contention that Congress somehow ratifies abstention through its silence on the matter,[242] but that the scheme established preserves both the goals of shared responsibility and ultimate congressional power.

The text-based critique has another serious weakness: it seems to rule out all abstention including *Younger* itself. Justice Douglas may have taken this position when he dissented in *Younger*,[243] but Justice Brennan concurred.[244] Justice Brennan's opinions on the subject advance the view that *Younger* is legitimate only as a narrow equitable exception to the district courts' general duty to take section 1983 cases.[245] But if the statutes impose such a duty it is hard to see how *Younger* is correct. If *Younger* is correct, its extensions, at least in the equitable context, cannot be attacked as violations of separation of powers. They may be bad equity, the utilization of improper values, or an incorrect weighing, but that does not make them illegitimate. In other words, the debate over *Younger* becomes like the debate over other recent Burger-Rehnquist Court restrictive jurisdictional doctrines: the questions are matters of policy, rather than matters of authority or lack of it.

It is worth noting that the same ambiguity pervades Justice Brennan's approach to other issues of abstention. In *Colorado River Water Conservation District v. United States*[246] the issue was whether a federal district court should dismiss a water rights case in deference to pending state litigation over the same matter. The Supreme Court, in an opinion by Justice Brennan, upheld the dismissal. He first analyzed the question as one of possible abstention. He posited a "virtually unflagging obligation of the federal courts to exercise the jurisdiction given them."[247] Still, abstention is permitted as an "extraordinary and narrow exception to [this] duty."[248] He identified three forms of permissible abstention, none of which applied to the *Colorado River* facts.[249] Justice Brennan's acceptance of judicial authority to evade the jurisdictional duty did not stop there, however.

242. *See id.* at 82-83 (rejecting the ratification rationale).
243. *See Younger*, 401 U.S. at 65 (Douglas, J., dissenting).
244. *Id.* at 56 (Brennan, J., concurring).
245. *See, e.g.*, Trainor v. Hernandez, 431 U.S. 434, 454 (1977) (Brennan, J., dissenting).
246. 424 U.S. 800 (1976).
247. *Id.* at 817.
248. *Id.* at 813 (quoting Allegheny v. Frank Mashuda Co., 360 U.S. 185, 188 (1959)).
249. The opinion discusses the following forms of abstention: *Pullman* abstention, which sends litigants to state court to resolve a state law issue which might obviate the

He posited a further, limited ability to decline to hear a case when parallel state proceedings are pending "for reasons of wise judicial administration."[250] Despite his disclaimer, *Colorado River* dismissals look a lot like *Younger* dismissals and certainly further some of the same federalism goals. It is true that the Court has sharply restricted *Colorado River* abstention.[251] The point is that Justice Brennan's acceptance of judicial power to formulate doctrines about not exercising jurisdiction, in a case in which his premise was the duty of federal courts to adjudicate, is totally at variance with the text-based separation of powers critique. That critique seemingly leaves no room for abstention, a point Professor Redish is ready to accept.[252]

It is tempting to conclude that not much is left of the text-based critique if it runs counter to current notions of separation of powers, requires the abandonment of all abstention, and is undercut by the general position of its strongest proponent. The Court, including Justice Brennan, however, might be wrong. Perhaps we have another *Erie* situation where the Court persists in statutory error until overwhelming evidence compels it to change its ways.[253] As noted, the duty proposition can be stated in several ways. Most of these can be reformulated as saying that the district courts should do what they normally do, including taking into consideration the role of state courts where appropriate. It is possible, however, that Congress in establishing the statutory scheme considered a role for state courts and rejected it. This argument is based in part on the history of section 1983 and in part on Congress's longstanding and active concern with judicial federalism embodied in the Anti-Injunction Act.[254] That statute parallels *Younger* in forbidding federal judicial interference with state judicial proceedings. However, it exempts

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need for a federal constitutional decision; abstention under cases such as Burford v. Sun Oil Co., 319 U.S. 315 (1943), which permits dismissal of cases based on state law claims involving matters of important state policy, especially where the state has established its own review mechanism; and, *Younger* abstention.

250. *Colorado River*, 424 U.S. at 818.

251. *See* Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 15 (1983). For a discussion of the rise and fall of *Colorado River* abstention, see *infra* notes 307-11 and accompanying text; *see also* Redish, *supra* note 16, at 97 (noting that *Cone* "substantially curbed" this form of abstention).

252. *See* Redish, *supra* note 16, at 92-95 (discussing how rejection of *Younger* would not seriously impair federalism values).

253. In Erie Railroad Co. v. Tompkins, 304 U.S. 64 (1938), the Court overturned a longstanding construction of the Rules of Decision Act, 28 U.S.C. § 1652, which permitted federal courts to fashion "general" common law. It relied in part on the historical analysis of Professor Charles Warren. *Erie*, 304 U.S. at 72-73.

254. 28 U.S.C. § 2283 (1988). Section 2283 provides in full as follows: "A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments."

from the prohibition injunctions "expressly authorized" by Congress in another statute. In *Mitchum v. Foster*[255] the Court held that section 1983 is such an exception.[256] Thus it can be argued that the general jurisdictional scheme of which section 1983 is a remedial part considered the *Younger* option and rejected it.[257] If so, the Court would, as a matter of separation of powers, have to accept the result.

Put this way, the text-based critique retains considerable force. Two responses are possible. First, the relationship between *Younger* and *Mitchum* is muddied at best.[258] All the Justices who participated in *Mitchum* insisted that it did not qualify the equity, comity, and federalism approach that *Younger* had propounded one year earlier.[259] The best way to harmonize the two is that *Mitchum* leaves intact the federal courts' authority to engage in federalistic abstention even though Congress wants it to hear the equitable action as an initial matter. A second point to note is that the seemingly absolute language of section 1983 has not prevented the Court from looking to common law tradition and methodology in developing a wide range of immunity defenses in section 1983 actions.[260] It is true that this is a substantive defense, but its development resembles the formulation of jurisdictional law in *Younger.* In each context the Court views itself as having authority to engage in traditional judicial policymaking in formulating doctrines that weaken the section 1983 absolute remedy. Indeed, the immunity cases are more sweeping in that they ban or limit the plaintiff's claim in any court. *Younger,* on the other hand, remits the plaintiff to another court with the possibility of federal appellate review.

Finally there is the contention, based on the federal common law cases (and perhaps on post-*Bivens* cases), that it is enough that Congress has entered the field. Separation of powers concerns dictate that the Court not add its own resolutions on top of what Congress has devised. As noted, however, the role of the statutes is to trigger questions of judicial authority, not to resolve them. Without jurisdiction the courts would not be involved at all in a case. The fact that the judiciary has a strong claim to competence in the area may answer arguments based on the refusal to formulate federal common law, although post-*Bivens* remedial cases cut against judicial action. The main response to the statutory presence argument is that it is incorrect to invoke statutes without considering their context

255. 407 U.S. 225 (1972).

256. *Id.* at 243.

257. *See* Redish, *supra* note 16, at 89-90 (noting that the Anti-Injunction Act shows Congress has limited federal judicial power "when it deemed such limitation[s] necessary to protect federalism interests").

258. *See id.* at 86-87.

259. *Mitchum,* 407 U.S. at 243; *id.* at 243-44 (Burger, C.J., concurring). It should be noted that the two Justices who did not participate, Justice Rehnquist and Justice Powell, were generally supportive of *Younger.*

260. *See* Brown, *Municipal Liability Under Section 1983 and the Ambiguities of Burger Court Federalism,* 27 B.C.L. REV. 883, 886-88 (1986).

and what they say. The statute in *City of Milwaukee* established liability. The Court declined to formulate new ones. In the post-*Bivens* cases the Court treats the relevant statutes as addressing the question of remedy. The Court declines to add an additional one. Statutes like section 1331 and section 1983 act broadly to set the judiciary into motion. They do not necessarily address specific questions of how it is to operate once underway.

In opting for this view of the statutes in question one can find considerable support in the well-known line of decisions interpreting section 1331's requirement that a case "arise under" the laws of the United States in order to be within the original jurisdiction of a federal district court.[261] Congress may well have chosen this language precisely to make federal jurisdiction as broad as possible.[262] The Court, however, has insisted on not treating this statute as a "wooden set of self-sufficient words."[263] The Court admits that the statute is "broadly phrased," but describes its own actions in applying this language as a process of ongoing construction and limitation "in the light of the history that produced it, the demands of reason and coherence, and the dictates of sound judicial policy which have emerged from the [Judiciary] Act's function as a provision in the mosaic of federal judiciary legislation."[264] Not only does the Court view section 1331 as giving it the authority to engage in "management of the federal judicial system,"[265] it utilizes that authority to keep cases partially concerning federal issues out of a federal trial court based in part on consideration for the role of state courts.[266] Apart from its resemblance to *Younger* abstention in terms of the specific result reached, the Court's development of "arising under" doctrine shows an understanding of the role of jurisdictional statutes that is closer to that of Professor Redish's critics than to the mandatory reading which he advocates.[267]

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261. Section 1331 provides that "[t]he district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States." 28 U.S.C. § 1331 (1988).

262. *See, e.g.*, Franchise Tax Bd. v. Construction Laborers Vacation Trust, 463 U.S. 1, 8 n.8 (1983).

263. Merrell Dow Pharmaceuticals v. Thompson, 478 U.S. 804, 810 (1986) (quoting Romero v. International Terminal Operating Co., 358 U.S. 354, 379 (1959)).

264. *Id.* at 810.

265. *Id.* at 808 (quoting *Franchise Tax Bd.*, 463 U.S. at 8).

266. In *Merrell Dow*, for example, the Court stated that "the presence of the federal issue as an element of the state tort is not the kind of adjudication for which jurisdiction would serve congressional purposes *and the federal system.*" *Id.* at 814 (emphasis added); *see also id.* at 808 (stating that "arising under" cases deal with "issues regarding the interrelation of federal and state authority"). There were, nonetheless, strong arguments for placing in federal court a case that relied, in part, directly on the Food, Drug, and Cosmetic Act as the source of the defendant's standard of conduct. *See id.* at 822-24, 827-28 (Brennan, J., dissenting).

267. The Court has also noted that Congress can step in to correct denials of section 1331 jurisdiction with which it disagrees. Franchise Tax Bd. v. Construction Laborers

What the text-based critique comes down to then is one set of arguments on how to read these statutes. Like the institutional variant, it is not the ultimate weapon it seemed at first. The debate over *Younger* cannot be cleansed of policy dimensions. Still, there are signs that the Court is rethinking *Younger,* or at least restricting it, and that the force behind this new approach is the notions of separation of powers.

V. Rethinking Younger*—The Court and the Separation of Powers Critique*

The juggernaut of *Younger* extension received a serious setback in the 1989 case of *New Orleans Public Service, Inc. (NOPSI) v. City Council.*[268] The Council is the regulatory body with jurisdiction over electric rates in New Orleans. It disallowed inclusion in the electric company's rate base of substantial amounts related to the construction of a nuclear power plant. The company asserted that a decision of the Federal Energy Regulatory Commission concerning the power plant constituted a federal law bar against the Council's action. It filed actions to challenge the Council's order in state and federal court. At issue before the Supreme Court in *NOPSI* was whether the federal district court should have abstained.

The Supreme Court ruled unanimously that it should not have. Justice Scalia's opinion, which reflected the views of seven members of the Court, dealt primarily with the propriety of *Younger* abstention.[269] He noted at the outset that the mere fact of a pending state proceeding of some sort did not trigger *Younger.*[270] The key question was whether the nature of the proceeding would make federal judicial intervention a demonstration of "lack of respect for the state as sovereign."[271] It thus became important to determine which state proceeding the federal suit was challenging. Justice Scalia analyzed the suit as aimed essentially at the Council's order.[272]

He then examined whether the Council proceeding itself called for *Younger* abstention. He concluded that it did not because it was "legislative" rather than "judicial" in nature.[273] He read the relevant precedents as requiring abstention only in the latter context.

Vacation Trust, 463 U.S. 1, 22 (1983); *see also* Finley v. United States, 109 S. Ct. 2003, 2010 (1989) (stating that Congress can overturn particular jurisdictional decisions and that the Court's cases provide a background of interpretative rules). Thus the Court seems to envision a process of, potentially, three stages. Congress passes jurisdictional statutes which the Court then "interprets" in accordance with its own, judicially developed, set of jurisdictional policies. Congress can then legislate again and reverse one of these interpretations. This process is similar to the approach to abstention supported in this Article.

268. 109 S. Ct. 2506 (1989).

269. *See id.* at 2515-20.

270. *Id.* at 2518.

271. *Id.*

272. *Id.* at 2518-19. *But see id.* at 2517 (the key question is whether state court action is the type to which *Younger* applies).

273. *Id.* at 2519-20.

The pendency of the state review suit became relevant because if it were an integral part of the legislative ratemaking process the order would not be ripe for federal court challenge.[274] He characterized the state court's review as not involving "anything other than a judicial act."[275] Because it was not part of the legislative process there was no ripeness problem.[276] Nor did the state court action pose a *Younger* abstention problem.[277] The federal court challenge was to the Council order. The existence of a state action to review it presented only a typical problem of parallel state and federal proceedings. For Justice Scalia, the federal suit was "insofar as our policies of federal comity are concerned, no different in substance from a facial challenge to an allegedly unconstitutional statute or zoning ordinance—which we would assuredly not require to be brought in state courts."[278]

NOPSI is an important case. It shows, as a general matter, that the Court is willing to apply the brakes forcefully to attempts to expand the outer limits of *Younger*. The case did involve pending judicial proceedings affecting an important state interest,[279] to which the state was a party. *NOPSI*'s specific significance is twofold. One key element is the narrow approach to applying *Younger* abstention to state administrative proceedings. Early decisions on the question were ambiguous.[280] However, in *Ohio Civil Rights Commission v. Dayton Christian Schools,*[281] decided in 1986, a majority of the Court appeared to take a hospitable approach. *Dayton* involved a federal court challenge to pending state adjudicatory administrative proceedings. Justice Rehnquist's opinion for five members of the Court not only seemed to say that the proceedings themselves warranted deference[282] but that the availability of state court judicial review cured any problems posed by the possible inability to raise federal constitutional claims at the administrative level.[283] Read broadly the Rehnquist opinion could support the proposition that once administrative proceedings *of any sort* have commenced a federal court must abstain from hearing challenges to them out of respect for the state court which might be asked to review them. *NOPSI* cuts

274. *Id.* at 2520.
275. *Id.*
276. *Id.*
277. *Id.*
278. *Id.*
279. *Id.* at 2516.
280. In Middlesex County Ethics Committee v. Garden State Bar Association, 457 U.S. 423 (1982), the Court directed *Younger* abstention in favor of a state administrative proceeding. It emphasized, however, that the proceedings were closely related to the functioning of the state's court system. *Id.* at 425-27.
281. 477 U.S. 619 (1986).
282. *See id.* at 627 n.2.
283. *Id.* at 629.

strongly in the other direction by focusing on the administrative proceedings and indicates that they will trigger *Younger* abstention only if they can be labelled "judicial." Whether judicial proceedings extend to all adjudicative hearings or only to those closely related to the judicial process remains to be clarified.[284] The Court also avoided discussing why one type of proceeding before an agency triggers abstention while another does not. In either case the agency is not a court.

An even more remarkable aspect of *NOPSI* is the Court's insistence on the narrow role of *Younger* abstention in general and the Court's apparent invocation of the separation of powers critique to reach this conclusion. The opening paragraph of Justice Scalia's analytical section reads like a reprint of Professor Redish's article. He states as incontrovertible "the proposition that federal courts lack the authority to abstain from the exercise of jurisdiction that has been conferred,"[285] and refers to their "duty" to exercise it.[286] "Underlying these assertions is the undisputed constitutional principle that Congress, and not the judiciary, defines the scope of federal jurisdiction within the constitutionally permissible bounds."[287]

One might then ask how abstention is ever permissible. Justice Scalia presents it as a narrow exception to the general duty.[288] He grounds it in part on equity and in part on the notion that the jurisdictional statutes were passed against background understandings of judicial discretion with respect to relief.[289] Treating the matter as one of relief is a little thin. For the typical *Younger* plaintiff it is, to paraphrase Justice Harlan, "injunctive relief or nothing."[290] Moreover, Professor Shapiro, whose article Justice Scalia cites as his major support, was referring to a broader range of discretion over jurisdiction.[291] Justice Scalia seems uneasy about claiming any such broad authority.

The same uncertainty about *Younger,* grounded in notions of separation of powers, may help explain the Court's mystifying decision in *Deakins v. Monaghan.*[292] In *Deakins* the federal plaintiffs were the subjects of an ongoing state grand jury proceeding. They brought a section 1983 action seeking damages and injunctive relief against state officials who had searched their premises and seized documents. A major issue before the Supreme Court was whether the lower federal court should entertain the damages claim, given that

284. The Court also left open whether "an administrative proceeding to which *Younger* applies [can] be challenged in federal court . . . after the administrative action has become final." *NOPSI,* 109 S. Ct. at 2518 n.4.

285. *Id.* at 2512.

286. *Id.* at 2513 (quoting Willcox v. Consolidated Gas Co., 212 U.S. 19, 40 (1909)).

287. *Id.*

288. *Id.* at 2518.

289. *Id.* at 2513.

290. *See* Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 410 (1971) (Harlan, J., concurring) (stating that "[f]or people in Bivens' shoes, it is damages or nothing").

291. Shapiro, *supra* note 80, at 547-61 (listing examples of discretionary determinations).

292. 484 U.S. 193 (1988).

the state court overseeing the grand jury could not award damages. The Court held that a stay of the federal action was the proper course.[293]

Younger might well justify a stay. Facts found in the damages action could determine issues in the state criminal proceeding. This would certainly constitute intrusion on the state's criminal processes even though the federal proceedings were not aimed at them directly. The Court, however, declined to apply *Younger* in directing a stay.[294] As in *NOPSI,* it cited the obligation of federal courts to exercise their jurisdiction and insisted that there are only narrow exceptions to this duty.[295] The obvious question is what did justify the stay, given the general duty. The Court never said. It implied that stays are different from dismissals. Dismissal, as opposed to a stay, would be improper.[296] Yet five years earlier, in a related context, the Court had relied on notions of duty to exercise jurisdiction in holding that a stay is no different from a dismissal.[297] Each, the Court then stated, is a refusal to exercise jurisdiction.

Perhaps *Deakins* is a sub silentio application of *Younger* to damages claims, an issue thought to be still open.[298] The concurring Justices viewed this as the only plausible explanation for the decision.[299] What is striking is that the Court did not wish to take this step, and that it was troubled by the difficulties of reconciling *Younger* with the asserted duty of the federal courts to exercise jurisdiction. The separation of powers critique seems very much a factor in the Court's approach. It may have finessed for the moment the issue of *Younger*'s legitimacy by appearing to confine the doctrine to cases where equitable principles govern. Even in equity cases, however, the Court cannot forever evade the question of how it ignores the duty which Congress has imposed.

At this point it is helpful to consider briefly developments in other abstention doctrines. These doctrines are beyond the scope of this Article, but, as the Court has often noted, there is a close relationship between *Younger* and other forms of abstention.[300] Moreover, the separation of powers critique casts equal doubt on the validity of any kind of abstention.

The Court's general tendency in other areas has been either to

293. *Id.* at 201-04.
294. *Id.* at 202.
295. *Id.* at 202-03.
296. *Id.* at 202-04.
297. Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 27-28 (1983).
298. *See Deakins,* 484 U.S. at 202 & n.6.
299. *Id.* at 207-08 (White, J., concurring).
300. *E.g.,* Pennzoil Co. v. Texaco, 481 U.S. 1, 11 n.9 (1987); *see* Moore v. Sims, 442 U.S. 415, 428 (1979).

restrict a doctrine or to refuse to allow any extension of it. In *Hawaii Housing Authority v. Midkiff*[301] a lower court judge had raised the possibility of a state law construction that would obviate federal constitutional issues. He thus suggested *Pullman* abstention.[302] The Supreme Court summarily dismissed the suggestion, stating that "[i]n the abstract, of course, such possibilities always exist. But the relevant inquiry is not whether there is a bare, though unlikely, possibility that state courts *might* render adjudication of the federal question unnecessary."[303] In other recent *Pullman* abstention cases the Court has quite explicitly reined in that doctrine's preference for initial state adjudication whenever the plaintiff has attacked state action on state as well as federal grounds.[304]

Similarly, in *NOPSI* the Court rejected the possibility of abstention under the *Burford* doctrine.[305] This doctine applies to interference with some regulatory schemes, particularly those presenting difficult and important questions of state law where the state has shown particular concern with the form of review of administrative action.[306] The doctrine is of uncertain scope and has not played a major role in recent Supreme Court decisions. Like *Pullman,* however, it is potentially quite inclusive. It seems that for this very reason the Court in *NOPSI* was anxious to give *Burford* abstention a narrow scope.

The most striking developments have come in the field of *Colorado River* abstention, a doctrine that gives federal courts some ability to defer to parallel state proceedings out of concerns for "wise judicial administration."[307] In the original *Colorado River* case Justice Brennan, writing for the majority, asserted that the doctrine is narrow in scope. Nevertheless, he upheld dismissal of a federal complaint in a case in which the interests favoring federal adjudication were significant.[308] In *Will v. Calvert Fire Insurance Co.*[309] Justice Rehnquist, writing for the plurality, took advantage of the *Colorado River* opening and posited the existence of a general discretion on the part of district court judges to defer to parallel state proceedings.[310] Justice Brennan acted forcefully to stop this development in *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*[311] His opinion for the Court upheld reversal of a stay of parallel federal proceedings

301. 467 U.S. 229 (1984).

302. *Id.* at 237 & n.4. The doctrine takes its title from Railroad Commission v. Pullman Co., 312 U.S. 496 (1941), in which the Court stated that federal court abstention is required when state law is uncertain and a state court's clarification of state law might make a federal court's constitutional ruling unnecessary.

303. *Midkiff,* 464 U.S. at 237.

304. *See, e.g.,* City of Houston v. Hill, 482 U.S 451, 467-68 (1987); Wisconsin v. Constantineau, 400 U.S. 433, 439 (1971).

305. The doctrine takes its name from Burford v. Sun Oil Co., 319 U.S. 315 (1943).

306. *NOPSI,* 109 S. Ct. at 2513-15.

307. Colorado River Water Conservation Dist. v. United States, 424 U.S. 800, 817 (1976) (quoting Kerotest Mfg. Co. v. C-O-Two Five Equip., 342 U.S. 180, 183 (1952)).

308. *See id.* at 821.

309. 437 U.S. 655 (1978).

310. *Id.* at 664.

311. 460 U.S. 1 (1983).

and emphasized the exceptional character of the *Colorado River* doctrine.[312]

Taken together these cases show the same ambivalence toward abstention that *NOPSI* and *Deakins* demonstrate. On the one hand, the Court seems to wish to preserve a core area for each abstention doctrine. On the other hand, it is mindful of their potential to swallow up large chunks of federal jurisdiction. The non-*Younger* cases are also noteworthy in that most of them rely heavily on the notion of a "duty" to exercise jurisdiction. Indeed, *Colorado River* contains the frequently quoted language that the federal courts have a "virtually unflagging obligation" to exercise the jurisdiction that Congress has conferred.[313] One could of course point to the word "virtually" as showing that the judiciary retains room to maneuver.[314] However, the Court's recent focus seems to be on the concept of duty. Taken to its logical conclusion this concept would mean the end of all abstention.

It is apparent from the recent cases that the Court feels a strong need both to legitimize and to limit *Younger* and other forms of abstention. The most obvious explanation for this development is that the separation of powers critique has had a major impact. Faced with a conflict between federalism and separation of powers the Court leans toward the latter as the preferred and dominant constitutional value. Because the recent cases discuss the problem somewhat cryptically one has to infer this, but the inference is inescapable.

As for the two variants of the separation critique, the Court seems more concerned with its institutional dimensions than with matters of direct statutory command. It is true that there is an occasional reference to the fact that Congress has acted to confer jurisdiction,[315] but there is no detailed exercise in statutory interpretation such as one finds in Justice Brennan's opinions on *Younger*. The Court no doubt is concerned about encroachment on the legislative domain. The primary institutional concern, however, is most likely a sense that the Court has aggrandized its own domain. The problem for the current Court is that *Younger* is unadorned judicial policymaking. Its decisions on the Eleventh Amendment and standing,

312. *Id.* at 19.
313. *Colorado River*, 424 U.S. at 817.
314. *Cf.* Shapiro, *supra* note 80, at 543-44 (stating that recent statements of obligation seem "less frightening" than the first Justice Marshall's observation that to decline the exercise of given jurisdiction would be " 'treason to the constitution' ") (quoting Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 404 (1821)).
315. *E.g.*, *NOPSI*, 109 S. Ct. at 2513.

for example, can be attacked as activist judicial formulation of restrictive jurisdictional doctrine,[316] but at least there is a textual peg to hang them on. *Younger* has none. It is federal common law emanating from a Court that treats such lawmaking as disfavored. It is activist statutory construction—to the extent the notion of background understandings can be treated as statutory construction—by a Court that emphasizes adhering to the letter. Indeed the whole exercise is jarringly out of tune with the Burger-Rehnquist Courts' general emphasis on the subordinate role of the federal judiciary in national policymaking.[317]

The question that then arises is whether, if the Court takes the separation of powers critique seriously, it will abandon *Younger* altogether. One would not expect such a step from a federalist Court, and the cases show a desire to preserve a substantial core. Even Justice Brennan admitted that in its narrow context *Younger* itself is legitimate.[318] As a matter of policy, the *Younger* doctrine has considerable force. Stopping a state court from the initial adjudication of a matter is considerably more intrusive than preventing it from relitigating a matter already decided by a federal court. The cases in which the *Younger* problem arises generally present more than a simple problem of parallel proceedings in two court systems. The question is whether the federal court system can be used to halt the state system on the spot, or at least to seize much of the case from it.

The separation of powers critique is presented as distinct from the policy debate over *Younger.*[319] Yet, if one accepts the analysis offered above, that argument is not conclusive in either its textual or institutional terms. It too presents substantial questions of policy. One is an issue of statutory interpretation: whether it is legitimate to go beyond the texts to generalized background understandings. The fundamental policy question that the separation of powers critique raises is one of institutional roles: is it consistent with constitutional values and structure for the judiciary to share with Congress a substantial role in matters of jurisdiction like that which it has played in developing the *Younger* doctrine?

The recent separation of powers cases themselves certainly point in the general direction of shared responsibilities. The field of federal-state judicial relations seems particularly appropriate for this interaction. The Court brings to bear a double expertise: its direct familiarity with how courts operate and its overall concern for matters of federal-state balance. Maintaining this balance between our two judicial systems seems like a perfectly natural role for the nation's highest court to play.[320] Looked at this way, the exercise in

316. *E.g.,* Nichol, *Abusing Standing: A Comment on* Allen v. Wright, 133 U. PA. L. REV. 635 (1985).

317. *See, e.g.,* Brown, *Article III as a Fundamental Value—The Demise of* Northern Pipeline *and Its Implication for Congressional Power,* 49 OHIO ST. L.J. 55, 80-83 (1988).

318. *E.g.,* Huffman v. Pursue, Ltd., 420 U.S. 592, 613-14 (1975) (Brennan, J., dissenting).

319. Redish, *supra* note 16, at 71-72 & n.5.

320. *See* Pennzoil Co. v. Texaco, 481 U.S. 1, 11 n.9 (1987) (noting that abstention is

jurisdictional lawmaking which *Younger* represents should not be troubling to a conservative Court. It perpetuates a judicial role in federal-state relations. Chief Justice Rehnquist joined in the *Garcia* dissent which argued forcefully for such a role,[321] albeit in a different context. At the same time Congress retains the ultimate say. Its power over jurisdiction is preserved, as is its role, recognized in *Garcia,* as the primary allocator of responsibilities within the federal system. In sum, the Court is right in looking closely at *Younger* with an eye to separation of powers concerns. These concerns, however, do not call for its abandonment.

Conclusion

The separation of powers critique maintains that *Younger* abstention is an illegitimate exercise by the judiciary of power that belongs to Congress. It can be framed either as a textual proposition—that jurisdictional and related statutes forbid *Younger*—or as a matter of institutional role—that under the Constitution Congress alone possesses the power to authorize refusals to exercise jurisdiction—or both. The critique is certainly powerful. It is tempting to view the critique as "irrebuttable," yet the matter is not so simple. For one thing, it rules out all abstention. Justice Brennan, the Court's foremost proponent of a separation of powers attack, however, admitted the validity of *Younger* in its original context and of other forms of abstention. The extent to which the statutes resolve the question depends in large part on one's approach to construing them. Both statutory and institutional issues hinge on how one views the Court's role in jurisdictional matters. Particularly relevant are the Court's recent cases on separation of powers. They tend to support *Younger* and to weaken the separation of powers critique. Central to these cases is a notion of shared functions, of overlapping areas of competence. Certainly the Court has a good deal of competence in the functioning of the judicial system and the harmonization of federal-state relations. It seems logical for the country's highest court to exercise this competence, and the separation of powers cases support this common sense conclusion. Congress retains the final say. Its supremacy over jurisdiction is unchallenged.

It is also tempting to conclude that the Court is rethinking *Younger* to the point that it will be seriously curtailed if not abandoned. Developments in other abstention doctrines suggest this, as does the latest *Younger* case. It is true that the Court appears troubled by the

"designed to soften the tensions inherent in a system that contemplates parallel judicial processes").

321. Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 567 (1985) (Powell, J., dissenting).

separation critique, and that in a conflict between federalism and separation of powers the latter doctrine will be the preferred structural constitutional value. *Younger* is very much alive, however, as the 1987 *Pennzoil* decision[322] suggests.

Rather than a retrenchment we are likely to see a rethinking of *Younger.* One positive effect would be an open discussion of where the doctrine comes from. In the past the Court has suggested it has statutory roots only to say later that it is divorced from statute. *Younger* may have begun as an equity doctrine, but the Court has explicitly and implicitly moved away from that explanation. A return to equity is possible, although that would pose problems in damages cases. The Court may try to solve the authority question as a matter of statutory construction. With respect to the statutes, however, the main task is showing that they do not prevent *Younger,* rather than that they are the source of authority for it. Perhaps authority lies in the underlying concept of the judicial power of Article III. In any event open acknowledgement of the authority problem might also lead the Court to discuss explicitly what values it is considering. The role of the state courts seems paramount, but the Court might well explore whether the key is respect for them as institutions of semi-sovereign states or whether the key is a federal interest in state adjudication of federal matters.[323] A direct result of any general reexamination of *Younger* might be to decline to apply it when the state institutions involved are not judicial. Prior cases deferring to state executive and administrative actions may fall.[324] A core, and a substantial one at that, will remain. In the end that is a policy decision. It admits of no easy answer. It is one the Court can legitimately make.

322. *Pennzoil Co.,* 481 U.S. 1 (1987) (extending *Younger* to civil proceedings in which the state is not a party but in which its system of enforcing judgments is challenged).

323. *See* Althouse, *supra* note 49, at 1083-90.

324. *E.g.,* Rizzo v. Goode, 423 U.S. 362 (1976); *see* Althouse, *supra* note 49, at 1059-90 (arguing against abstention in such cases).